

Act-of-Production Immunity

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Imagine receipt of a government subpoena requiring the production of one's diary. Imagine further that the subpoena is accompanied by a grant of something called "act-of-production immunity." Finally, imagine that, consistent with the fifth amendment privilege against self-incrimination, and notwithstanding the grant of such immunity, the government is permitted to make use of the contents of that diary criminally to prosecute the witness.

Such a scenario is extreme but by no means farfetched. The plausibility of such a result will depend upon just how the courts unravel the intersection of two fifth amendment doctrines: immunity and the act-of-production privilege. The latter doctrine, which limits the privilege against self-incrimination to the act of producing subpoenaed evidence rather than in the contents of the evidence itself, is only of relatively recent significance.

This Article will address the scope and consequences of a grant of immunity where the privilege is so limited. Part I explores the development and analytical underpinnings of the current federal law on witness immunity. Part II explains the act-of-production privilege as it has evolved in the recent fifth amendment decisions of the United States Supreme Court and other courts. Part III examines several existing theories of the scope of the immunity conferred upon a witness validly exercising an act-of-production privilege. Part IV proposes an alternative approach to the problem of defining the nature and consequences of act-of-production immunity.

I. IMMUNITY

The fifth amendment to the United States Constitution guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."¹ This privilege to remain silent extends only to the avoidance of criminally inculcating oneself.² By removing any realistic danger of self-incrimination, the state may remove the basis for the privilege itself.³ It is by this rationale that a grant of immunity enables the government to compel testimony that would otherwise have been privileged.

Naturally, the question that arises is what must be immunized in order to overcome the bar against compelled self-incrimination. Because it is a constitutional privilege that is at stake, it seems manifest that the protections provided

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1. U.S. CONST. amend. V.

2. *Hale v. Henkel*, 201 U.S. 43, 66-67 (1906); *Brown v. Walker*, 161 U.S. 591, 597 (1896).

3. *Hale*, 201 U.S. at 67; Lushing, *Testimonial Immunity and the Privilege Against Self-Incrimination: A Study in Isomorphism*, 73 J. CRIM. L. & CRIMINOLOGY 1690, 1709 (1982).

by the grant of immunity must be coextensive with the rights afforded by the privilege itself. Unremarkably, the Court has so indicated on several occasions.⁴

That truism has not produced any easy consensus on the issue of what form immunity must take to be in fact coextensive with the privilege. Although there were some British antecedents,⁵ the first federal immunity statute in this country was not enacted until 1857.⁶ That statute provided for "transactional immunity,"⁷ whereby the testifying witness is immunized from prosecution "for any act or transaction about which he might testify."⁸

Five years later, that statute was amended⁹ to provide only for "use immunity,"¹⁰ a more limited form of immunity. Use immunity permits later prosecution of the immunized witness, providing that the witness's immunized testimony is not to be used against that witness.¹¹ Because the provision of use immunity does not require forfeiture of the ability to prosecute the witness, the granting of use immunity is potentially less costly to the government than the granting of transactional immunity. Consequently, in 1868, Congress enacted a general use immunity statute covering all witnesses testifying in federal judicial proceedings.¹² It was this statute, as later revised, that provided the United States Supreme Court with the opportunity to address the constitutional sufficiency of use immunity.¹³

In *Counselman v. Hitchcock*,¹⁴ the Court struck down as unconstitutional the governing use immunity statute. Starting with the premise that a constitu-

4. E.g., *Pillsbury Co. v. Conboy*, 459 U.S. 248, 254 (1983) ("any grant of immunity must be coextensive with the privilege"); *United States v. Apfelbaum*, 445 U.S. 115, 124 (1980) ("grant of immunity [must] be coextensive with the Fifth Amendment privilege"); *Kastigar v. United States*, 406 U.S. 441, 449 (1972) ("immunity granted [must be] coextensive with the scope of the privilege"); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 54 (1964) ("grant of immunity is valid only if it is coextensive with the scope of the privilege against self-incrimination"); *Counselman v. Hitchcock*, 142 U.S. 547, 565 (1892) ("protection of [immunity statute must be] coextensive with the constitutional provision").

5. The power to compel testimony dates at least as far back as 1562, Note, *Federal Witness Immunity Problems and Practices Under 18 U.S.C. §§ 6002-6003*, 14 AM. CRIM. L. REV. 275 (1976) [hereinafter Note, *Federal Witness Immunity Problems*], and the first statute authorizing grants of immunity to effect the power to compel testimony was enacted in 1710, Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1571 n.13 (1963) [hereinafter Note, *The Federal Witness Immunity Acts*].

6. Act of Jan. 24, 1857, ch. 19, § 2, 11 Stat. 156.

7. "[N]o person examined and testifying before either House of Congress, or any committee of either House, shall be held to answer criminally in any court of justice, or subject [sic] to any penalty or forfeiture for any fact or act touching which he shall be required to testify . . ." *Id.*

8. Mykkeltvedt, *To Supplant the Fifth Amendment's Right Against Compulsory Self-Incrimination: the Supreme Court and Federal Grants of Witness Immunity*, 30 MERCER L. REV. 633, 636 (1979) [hereinafter Mykkeltvedt I]. See also Feldman & Ollanik, *Compelling Testimony in Alaska: The Coming Rejection of Use and Derivative Use Immunity*, 3 ALASKA L. REV. 229, 230 (1986).

9. Act of Jan. 24, 1862, ch. 11, 12 Stat. 333.

10. "[T]he testimony of a witness examined and testifying before either House of Congress, or any committee of either House of Congress, shall not be used as evidence in any criminal proceeding against such witness in any court of justice . . ." *Id.*

11. L. TAYLOR, WITNESS IMMUNITY 73, 79 (1983); Note, *Federal Witness Immunity Problems*, *supra* note 5, at 277. Use immunity is thus less extensive than transactional immunity. A witness who receives use immunity may be subsequently prosecuted for the act or transaction that was the subject of his immunized testimony, provided that the witness's own testimony is not used against him.

12. Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.

13. *Counselman v. Hitchcock*, 142 U.S. 547, 560-61, 564 (1892).

14. 142 U.S. 547 (1892).

tionally sufficient grant of immunity must provide protection coextensive with the Constitution itself,¹⁵ the Court found use immunity deficient when measured against the guarantees of the fifth amendment. That amendment is violated if the defendant is compelled to furnish any link in the chain of evidence establishing his criminal culpability.¹⁶ While the use immunity statute in question barred direct use of the immunized testimony, it did not preclude the government from making derivative use of such testimony, *i.e.*, of "gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party."¹⁷ The use-immunized witness is thus compelled to provide the government with evidentiary leads that might ultimately culminate in the witness's own conviction.¹⁸ The witness compelled to testify under a grant of use immunity is consequently in an inferior position to the witness whose silence is secured by the fifth amendment. The inadequacy of use immunity as a substitute for that silence required the constitutional condemnation of that form of immunity.

The Court might (and arguably should) have stopped at that point. The case required no more than the declaration that use immunity is constitutionally deficient for its failure to protect the witness from derivative use of his testimony. Nevertheless, the Court reached further to announce that only full transactional immunity would be a constitutionally sufficient substitute for the fifth amendment right of silence.¹⁹

In response to *Counselman's* dictum, the next seventy-eight years produced a variety of federal immunity statutes, each conferring transactional immunity.²⁰ During this time, the Court was rarely called upon to address the constitutionality of these various immunity provisions.²¹ Nevertheless, the essential

15. *Id.* at 565.

16. *Id.* at 566. See also *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Lushing*, *supra* note 3, at 1702-08.

17. *Counselman*, 142 U.S. at 586.

18. In the words of the *Counselman* opinion, [use immunity] protected [the witness] against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted.

Id. at 564.

19. We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the [in]criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates.

Id. at 585-86. See also *Mykkeltvedt I*, *supra* note 8, at 636-38.

20. See *Kastigar v. United States*, 406 U.S. 441, 447 (1972). See also *Mykkeltvedt I*, *supra* note 8, at 642; *Mykkeltvedt*, *Ratio Decidendi or Obiter Dicta?: The Supreme Court and Modes of Precedent Transformation*, 15 GA. L. REV. 311, 318 (1981) [hereinafter *Mykkeltvedt II*]; Note, *Federal Witness Immunity Problems*, *supra* note 5, at 278; Note, *The Federal Witness Immunity Acts*, *supra* note 5, at 1570, 1611-12.

21. The constitutional sufficiency of transactional immunity was specifically established in *Brown v. Walker*, 161 U.S. 591 (1896). *Brown* rejected the contention that the fifth amendment privilege against self-incrimination is absolute and cannot be overcome by a grant of immunity in any form. *Id.* at 610; but see *id.* at 610-28 (Shiras, J., dissenting).

requirement of *Counselman*—that any derivative use of immunized testimony is constitutionally impermissible—was not forgotten.²²

Meanwhile, the availability of transactional immunity as an investigative tool was proving to be of limited practical significance. A witness testifying under a grant of transactional immunity would have every incentive to testify as to every prior criminal transgression, thereby securing immunity from prosecution for every subject of his or her testimony. Apparently as a result of this high cost of extending complete transactional immunity, such grants of immunity were rarely utilized as an investigative device.²³

In 1970, Congress enacted an entirely new federal immunity statute.²⁴ In place of a variety of ad hoc transactional immunity provisions,²⁵ a general "use/derivative use" immunity statute was substituted.²⁶

Use/derivative use immunity, like the simple use immunity found constitutionally lacking in *Counselman*,²⁷ proscribes direct use of the immunized testimony against the witness in a criminal prosecution. It goes further, however. In an attempt to avoid the defects specified in *Counselman*, use/derivative use immunity also proscribes indirect use of the immunized testimony, such as the use of any evidence discovered by the government "through an investigative lead supplied by the witness during his immunized testimony."²⁸ Thus, use/derivative use immunity provides greater protections for the immunized witness than mere use immunity. On the other hand, it is theoretically less costly (and hence more attractive) to the government than transactional immunity because it still permits prosecution of the immunized witness for crimes which are the subject of the immunized testimony.

In searching for a form of immunity that would both satisfy the *Counselman* requirements and relieve the government of the burden of granting full transactional immunity,²⁹ the drafters of the 1970 statute were not without his-

22. *E.g.*, *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 80 (1965) (any immunity statute which "does not preclude the use of the admission as an investigatory lead . . . is barred by the privilege"); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964) ("witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him") (emphasis added).

23. Note, *Federal Witness Immunity Problems*, *supra* note 5, at 278.

24. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 201(a), 84 Stat. 926-28 (codified as amended at 18 U.S.C. §§ 6001-05 (1985)).

25. The legislative history of the new immunity statute details the piecemeal development prior to the 1970 legislation. See 2 *Working Papers of the National Commission on Reform of Federal Criminal Laws*, 1409-11 (1970) [hereinafter *Working Papers*].

26. *Working Papers*, *supra* note 25, at 1405; Note, *Federal Witness Immunity Problems*, *supra* note 5, at 279. 18 U.S.C. § 6003 [hereinafter Section 6003] sets forth the procedure by which the Government may obtain a court order compelling a person who asserts his privilege against self-incrimination to testify or provide other information. In turn, 18 U.S.C. § 6002 [hereinafter Section 6002] provides that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

27. See *supra* notes 9-19 and accompanying text.

28. L. TAYLOR, *supra* note 11, at 79.

29. The legislative history of Section 6002 recognizes that,

[h]istorically, two conflicting considerations underlie the drafting and revision of immunity statutes. One consideration is that the immunity conferred leaves the witness, who is compelled to make a disclosure under pain of contempt punishment, in the same position insofar as possible as though his right of silence

torical guidance. Three items in particular were of historical significance in defining the perimeters of this new concept. First, *Counselman* itself, stripped of its dicta insisting upon transactional immunity, had focused upon derivative use of immunized testimony as the constitutional infirmity of simple use immunity.³⁰

Second, some six years prior to the enactment of the new immunity statute, the Court had specifically bestowed its constitutional blessing upon use/derivative use immunity, at least in a limited context. In *Murphy v. Waterfront Commission*,³¹ the Court resolved the question of "whether one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction."³²

The question could have been resolved in any one of several fashions. The Court might have ruled that the risk of self-incrimination leading to prosecution by another jurisdiction was too insubstantial to warrant fifth amendment protection. But that result, by placing the immunized witness in an inferior position to one lawfully maintaining silence in reliance upon the privilege, would have failed to satisfy the fundamental principle that "a grant of immunity is valid only if it is coextensive with the scope of the privilege against self-incrimination."³³

Alternatively, the Court might have simply recognized that the risk of prosecution by another sovereign justified the post-immunity assertion of the privilege. But that conclusion would have rendered immunity grants practically worthless. Unless the jurisdiction extending the immunity grant could obtain the concession of all other relevant jurisdictions to forego prosecution of the immunized witness,³⁴ then the immunized witness could still refuse to testify in reliance upon the privilege.

under a proper plea of the privilege against compulsory self incrimination had been left undisturbed. The second consideration is that grants of immunity be as narrow and precise as possible so as to minimize the upsetting effect on the law enforcement activity of either the Federal or State governments.

Working Papers, *supra* note 25, at 1412.

30. See *supra* notes 17-18 and accompanying text; *Working Papers*, *supra* note 25, at 1407.

31. 378 U.S. 52 (1964).

32. *Id.* at 53. In fact, the petitioners in *Murphy* were granted immunity under state law and subsequently refused to answer questions from state investigators on the grounds that their answers might tend to incriminate them under federal law. *Id.* at 53-54. But the issue presented to the Court in *Murphy* was essentially the same as if a federally immunized witness refused to respond to federal questioning for fear of self-incrimination leading to state prosecution. *Id.* at 53 n.1. The same day that the *Murphy* opinion was announced, the Court, in *Malloy v. Hogan*, 378 U.S. 1 (1964), held that the fifth amendment privilege against self-incrimination is, by virtue of the due process clause of the fourteenth amendment, applicable in state proceedings, *id.* at 8, and that the standards for determining the validity of claims of the privilege in state proceedings are identical to those commanded by the fifth amendment in federal proceedings, *id.* at 11. Thus, the constitutional sufficiency and consequences of state immunity grants must meet the requirements imposed by *Counselman* upon federal grants of immunity.

33. *Murphy*, 378 U.S. at 54. See *supra* note 4 and accompanying text. Indeed, given the substantial overlap between federal and state criminal jurisdiction, see Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117 (1987), the risk of cross-jurisdictional self-incrimination cannot fairly be regarded as insubstantial.

34. After *Counselman*, and prior to the enactment of Section 6002, immunity occurred in the form of full transactional immunity. See *supra* notes 20-23 and accompanying text.

Finally, the Court might have given extraterritorial effect to the grant of immunity, ruling that one jurisdiction's conferral of transactional immunity would shield the witness from prosecution by all other jurisdictions as well. This approach would have preserved both the fifth amendment rights of the immunized witness and the investigative utility of the grant of immunity. However, to the extent that immunity took the form of complete transactional immunity, the Court quite understandably was reluctant to permit a jurisdiction, by a grant of immunity, unilaterally to prevent every other jurisdiction from prosecuting the witness for related crimes.³⁵

None of these approaches presented a satisfactory solution to the situation where a witness immunized by one jurisdiction fears self-incrimination contributing to his prosecution in another jurisdiction. What was needed was a result which would preserve the legitimate interests of the immunized witness, the immunizing jurisdiction, and all other jurisdictions. That objective was accomplished by the adoption of use/derivative use immunity:

[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.³⁶

The beauty of this approach is that, at least theoretically, it avoids all of the glaring defects of the several alternatives discussed above. Because no jurisdiction may make direct or indirect use of the immunized testimony, the immunized witness suffers no risk of being compelled to contribute to his own demise in a prosecution by a non-immunizing jurisdiction.³⁷ Because the immunized witness has no legitimate fear of self-incrimination and thus no privilege to refuse to testify, the immunizing jurisdiction is able to compel his testimony in consideration for the grant of immunity. And because other, non-immunizing jurisdictions remain free to prosecute the immunized witness solely on the basis of evidence not derived from his immunized testimony, the grant of immunity

35. The consequences of such a rule could have been disastrous. Suppose, for example, that state police officers were to arrest an individual for possession of a small quantity of cocaine. Believing this individual to be a relatively insignificant offender, state prosecutors extend transactional immunity to this individual in exchange for testimony concerning his drug sources. Unbeknownst to the state officials, federal agents and prosecutors are in the process of investigating a large-scale cocaine distribution organization in which that same individual is a major figure. A rule giving extraterritorial effect to the state's grant of immunity would insulate this individual from all federal charges relating to the subject of his immunized testimony.

Precisely for these reasons, the decision to immunize "is peculiarly an executive one . . .," *Pillsbury Co. v. Conboy*, 459 U.S. 248, 261 (1983), and the Court undoubtedly had no appetite for judicial resolution of the competing law enforcement interests of separate jurisdictions.

36. *Murphy*, 378 U.S. at 79 (footnote omitted).

37. *Id.* at 101 (White, J., concurring).

by one jurisdiction does not interfere with the prosecutive prerogatives of other jurisdictions.

Of course, the acceptability of use/derivative use immunity in *Murphy* was virtually necessitated by the context of the issue presented in that case. The problem for the Court was to preserve the legitimate interests of three component groups: immunized witnesses, immunizing jurisdictions, and other jurisdictions. There simply was no alternative to use/derivative use immunity that would not have unacceptably sacrificed at least one of these interests.

But if use/derivative use immunity is constitutionally sufficient in this circumstance, then why would it be unacceptable in any other context? Did not *Murphy* necessarily reject the *Counselman* dicta requiring transactional immunity?³⁸ The drafters of Section 6002 certainly thought so, relying upon *Murphy* to defend the constitutional sufficiency of use/derivative use immunity.³⁹

Third, to the extent that the objective of use/derivative use immunity is to preserve the pre-immunity relationship between the government and the immunized witness,⁴⁰ there already existed a parallel model in the law of constitutional criminal procedure. Generally, where law enforcement authorities obtain evidence in violation of the defendant's privilege against self-incrimination, the defendant is not as a consequence deemed to be immune from prosecution. The defendant may still be prosecuted on the basis of evidence derived independently of the unlawful police conduct.⁴¹

However, an illegally-obtained confession results in the suppression not only of the confession itself, but also of evidence derived directly from the confession.⁴² This truism is but a particular manifestation of the "fruits of the poisonous tree" doctrine.⁴³ In the language of the metaphor, the evidence obtained as a direct result of the illegal police conduct is referred to as the "poisonous tree," while evidence derived therefrom is referred to as the "fruits."⁴⁴ If the exclusionary rule were to apply only to the "poisonous tree" and not also to the "fruits," then the deterrent value of suppression would be substantially compromised.⁴⁵

38. Indeed, Justice White, concurring in *Murphy*, expressed precisely that view. *Id.* at 104-05.

39. *Working Papers*, *supra* note 25, at 1423-25. For a further discussion of the impact of *Murphy*, see BERGER, *TAKING THE FIFTH* 70-71 (1980).

40. Certainly this is precisely what the objective was. The Constitution demands no less than that the immunized witness enjoy the same protections afforded by the privilege against self-incrimination. See *supra* note 4 and accompanying text. But the drafters of Section 6002 envisioned that this principle could be accomplished without providing the witness with the windfall of full transactional immunity. If, for example, prior to the granting of immunity, the government had already developed its case against the witness, then allowing the prosecution of the witness to go forward solely on the basis of this pre-immunity evidence (as well as post-immunity evidence derived therefrom independently of the immunized testimony) would not violate the constitutional principle set forth above. The task was to define the scope of immunity in such a way as to recreate circumstances as they would have existed in the absence of the immunized testimony.

41. Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 CAL. L. REV. 579, 588 (1968).

42. *Harrison v. United States*, 392 U.S. 219, 222 (1968); *Wong Sun v. United States*, 371 U.S. 471, 485 (1963).

43. The phrase "fruits of the poisonous tree" was first used by Justice Frankfurter in *Nardone v. United States*, 308 U.S. 338, 341 (1939).

44. Pitler, *supra* note 41, at 581.

45. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). *Silverthorne Lumber* is a perfect illustration of this principle. There, federal officials, with neither a warrant nor probable cause, entered the de-

The object of the "fruits of the poisonous tree" doctrine is to "restore[] the situation that would have prevailed if the Government had itself obeyed the law."⁴⁶ This is accomplished by allowing the prosecution to go forward, but without the benefit of the illicitly acquired "poisonous tree" or the derivative "fruits."⁴⁷

defendants' business premises and seized various documents. *Id.* at 390. The documents were ordered returned to the defendants because of the illegal seizure. *Id.* at 391. However, the government, based solely upon its earlier inspection of the documents, caused grand jury subpoenas *duces tecum* to be issued to the defendants requiring the production of the very same documents. *Id.* Judgments of contempt were entered against the defendants for refusal to comply with the subpoenas and a subsequent court order. *Id.* at 390. Reversing those convictions, the Court wrote:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.

Id. at 392. Without the suppression of the "fruits" (in *Silverthorne Lumber* the evidence to be produced in response to the subpoenas), a calculating police officer would still have had a significant incentive to engage in the illegal search of the office and seizure of the documents.

46. *Harrison*, 392 U.S. at 224 n.10 ("exclusion of evidence causally linked to the Government's illegal activity no more than restores the situation that would have prevailed if the Government had itself obeyed the law"). See also *Nix v. Williams*, 467 U.S. 431, 443 (1984) ("the prosecution is not to be put in a better position than it would have been in if no illegality had transpired").

47. The discussion in the text may suggest that the determination of what constitutes the excluded "fruits" is simply a matter of establishing a logical, or but-for, causal relationship between the "fruits" and the "poisonous tree" itself. Such is not the case. The Court has frequently eschewed the notion that a mere but-for relationship between the "fruits" and the "poisonous tree" is sufficient for suppression of the "fruits." *E.g.*, *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980); *Dunaway v. New York*, 442 U.S. 200, 217 (1979); *United States v. Ceccolini*, 435 U.S. 268, 274 (1978); *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). Instead, the Court has admitted the "fruits" where the "connection [has] become so attenuated as to dissipate the taint." *Nardone v. United States*, 308 U.S. 338, 341 (1939). See also Note, *Illegally Acquired Information, Consent Searches, and Tainted Fruit*, 87 COLUM. L. REV. 842, 845-46 (1987) [hereinafter Note, *Illegally Acquired Information*]. The test has been "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, 371 U.S. at 488, quoting from J. MAGUIRE, EVIDENCE OF GUILT 221 (1959).

Extracting practical guidelines from such platitudes has been neither simple nor terribly satisfying. Questions based upon illegally seized evidence are certainly a derivative use of the illegal search. *United States v. Calandra*, 414 U.S. 338, 354 (1974). It is also relatively clear that an incriminatory admission following on the heels of an illegal arrest will be suppressed as the "fruits of the poisonous tree," as a statement under such circumstances cannot fairly be regarded as "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Wong Sun*, 371 U.S. at 486. Moreover, the provision of *Miranda* warnings between the illegal arrest and the inculpatory admissions, although a relevant factor, does not in and of itself constitute the attenuation necessary for the admissibility of the statements. *Brown v. Illinois*, 422 U.S. 590, 603 (1975). Instead the Court has looked to such factors as the temporal proximity of the arrest and the confession, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct. *Taylor v. Alabama*, 457 U.S. 687, 690 (1982); *Rawlings*, 448 U.S. at 107-10; *Dunaway*, 442 U.S. at 218; *Brown*, 422 U.S. at 603-04. See also Note, *Illegally Acquired Information*, *supra*, at 854-55. By contrast, an independently reliable in-court identification is per se not the tainted "fruits" of an illegal arrest. *United States v. Crews*, 445 U.S. 463 (1980).

It has been suggested that, unlike the situation where the "poisonous tree" is a fourth amendment violation, fifth amendment violations may yield little or no opportunity for the government to attenuate the taint in order to accomplish admissibility of derivative fruits. *Pitler*, *supra* note 41, at 620. Note, *Standards for Exclusion in Immunity Cases After Kastigar and Zicarelli*, 82 YALE L.J. 171, 176-78 (1972) [hereinafter Note, *Standards for Exclusion*]. Support for that proposition may arguably be found in *Harrison*, 392 U.S. at 219. In *Harrison*, the defendant's first conviction was reversed because the Government had introduced illegally obtained confessions in its case in chief. *Id.* at 220. On retrial, the Government introduced the defendant's trial testimony from the first trial. *Id.* at 221. Because the circumstances indicated that the defendant's original trial testimony had been of-

The parallel between the coerced confession and immunity scenarios is manifest. In both situations, the government compels the individual to incriminate him or herself. In the case of the coerced confession, the law generally precludes the government from making any evidentiary or investigatory use of the self-incriminatory revelations, but it does not bar prosecution entirely. If such an after-the-fact remedy is constitutionally sufficient when the government behaves unlawfully, why must the greater restriction of barring prosecution altogether be placed upon the government when it proceeds properly with a grant of immunity? The irony of transactional immunity is that the government may be tactically in a better position after coercing a confession in a police station than it is after immunizing testimony before a grand jury.⁴⁸

The parallel between the coerced confession and immunity situations, and the ironic overinclusiveness of transactional immunity, were not lost upon at least one member of the Court.⁴⁹ So too the drafters of Section 6002 were aware of the coerced confession model, and referred to the exclusionary remedy in that context as "[u]nintentional immunity."⁵⁰ The legislative history makes clear that Section 6002 immunity was to be of the "same scope as that frequently, even though unintentionally, conferred as the result of constitutional violations by law enforcement officers."⁵¹

The judgment of the proponents of Section 6002 was vindicated a short time after its enactment in *Kastigar v. United States*.⁵² There the Court rejected a constitutional attack upon Section 6002 and endorsed the constitutional sufficiency of use/derivative use immunity. The Court found use/derivative use immunity, as specified in Section 6002, to be "coextensive with the scope of the privilege against self-incrimination,"⁵³ because it "leaves the witness and the

ferred to counteract the confessions, the Court ruled that the defendant's testimony at his first trial was itself the tainted "fruits" of the illegally obtained confession. *Id.* at 223-26.

By contrast, in *Oregon v. Elstad*, 470 U.S. 298 (1985), the Court held that an otherwise voluntary confession acquired in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), does not taint a subsequent confession made after the provision of *Miranda* warnings. The difficulty in reconciling *Elstad* with other decisions in the "fruits of the poisonous tree" area can perhaps, at least in part, be attributed to the Court's growing disaffection for *Miranda* itself. See Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471, 472 (1985).

Finally, where the "fruits" sought to be suppressed consist of the testimony of a witness (in the sense that the government learns of the existence or significance of a witness as a result of unlawful conduct), as opposed to tangible evidence, "a closer, more direct link between the illegality and that kind of testimony is required" for exclusion. *Ceccolini*, 435 U.S. at 278. The Court's greater willingness to find attenuation dissipating the taint in this context is based upon: (1) the likelihood that a witness is willing to testify freely, purging the causal relationship to the prior illegality, *id.* at 276-77, and (2) the catastrophic consequence of permanently disqualifying a witness from testifying, even as to matters unrelated to the prior illegality, *id.* at 277.

48. See Humble, *Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment*, 66 TEX. L. REV. 351, 357 (1987).

49. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 102-03 (1964) (White, J., concurring).

50. *Working Papers*, *supra* note 25, at 1419.

51. *Id.* at 1446. See also *Pillsbury Co. v. Conboy*, 459 U.S. 248, 276-77 & n.2 (1983) (Blackmun, J., concurring).

52. 406 U.S. 441 (1972).

53. *Id.* at 453. The Court stated that transactional immunity affords "considerably broader protection than does the Fifth Amendment privilege," *id.*, and that any indication to the contrary in *Counselman v. Hitchcock*, 142 U.S. 547 (1892), discussed *supra* at notes 14-19 and accompanying text, was nonbinding dicta, *id.* at 453-55.

prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege."⁵⁴

The Court acknowledged that the protection against both use and derivative use of immunized testimony is "analogous" to the exclusionary remedy in cases of coerced confessions.⁵⁵ However, it is by no means clear that the "attenuation" doctrine⁵⁶ limits the exclusionary principle as applied to evidence derived from immunized testimony. It has been widely suggested that it should not, first, because the justification for the scope of immunity, unlike the exclusionary rule remedy, does not depreciate in relation to the decreasing efficacy of deterring police misconduct, and second, because allowing even attenuated derivative evidence would violate the principle that the scope of immunity must be coextensive with the privilege itself.⁵⁷

That conclusion finds considerable support in the *Kastigar* opinion. There, the Court noted that Section 6002 imposes a "total prohibition on use,"⁵⁸ "assuring that the compelled testimony can in *no way* lead to the infliction of criminal penalties."⁵⁹ This includes "barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures."⁶⁰ The *Kastigar* Court further placed upon the government "the heavy burden of prov-

54. *Kastigar*, 406 U.S. at 462.

55. *Id.* at 461.

56. The "attenuation" doctrine permits the admission of some derivative evidence where the causal connection to the official illegality is so "attenuated" as to have "dissipated the taint" of such evidence. *Nardone v. United States*, 308 U.S. 338, 341 (1939). The doctrine is more fully discussed, *supra* note 47.

57. *United States v. Kurzer*, 534 F.2d 511, 516-17 (2d Cir. 1976); *In re Grand Jury Proceedings*, 497 F. Supp. 979, 983-84 (E.D. Pa. 1980); Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791, 829-30 (1978); L. TAYLOR, *supra* note 11, at App. B, 173-77; Note, *The Scope of Testimonial Immunity Under the Fifth Amendment: Kastigar v. United States*, 6 LOY. L.A.L. REV. 350, 378-79 (1973); Note, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar*, 19 VILL. L. REV. 470, 488-89 (1974); Note, *Standards for Exclusion*, *supra* note 47, at 178-81.

In *Kurzer*, the Court reasoned that, where the government learns of the identity and significance of a witness from immunized testimony, that witness may not be used in a prosecution of the immunized party. 534 F.2d at 516-17. This is in stark contrast to the situation where a witness is the "fruit" of a fourth amendment violation. See *United States v. Ceccolini*, 435 U.S. 268 (1978), discussed *supra* at note 47.

That contrast is apparent elsewhere as well. Immunized testimony may not be used to impeach the immunized witness. *New Jersey v. Portash*, 440 U.S. 450, 456-60 (1979). However, evidence obtained in violation of the fourth amendment, while inadmissible as substantive evidence, is admissible to impeach the defendant's testimony. *United States v. Havens*, 446 U.S. 620 (1980); *Walder v. United States*, 347 U.S. 62 (1954). So too evidence obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), is admissible for the purpose of impeachment. *Harris v. New York*, 401 U.S. 222 (1971).

58. *Kastigar*, 406 U.S. at 460.

59. *Id.* at 461 (emphasis added).

60. *Id.* at 460 (footnote omitted). Plainly this proscription bars the use of immunized testimony to develop other evidence against the immunized witness. It also appears that the prohibition against derivative use covers nonevidentiary uses, such as focusing the investigation upon certain persons or subjects, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning trial strategy, and preparing cross-examination. See, e.g., *United States v. Semkiw*, 712 F.2d 891, 895 (3d Cir. 1983); *United States v. Pantone*, 634 F.2d 716, 723 (3d Cir. 1980); *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973); *United States v. Carpenter*, 611 F. Supp. 768, 779-80 (N.D. Ga. 1985); *United States v. Smith*, 580 F. Supp. 1418, 1421-22 (D.N.J. 1984). But see *United States v. Byrd*, 765 F.2d 1524, 1530 (11th Cir. 1985) (provided all evidence presented to grand jury independent of immunized testimony, irrelevant that immunized testimony may have influenced decision to indict); Humble, *supra* note 48 (arguing for limitation of "derivative use" to evidentiary uses). The Department of Justice guidelines indicate that, in a subsequent prosecution of an immunized witness, "[t]he government will . . . have to show that it has made no 'non-evidentiary' use of the testimony or its fruits, such as a decision to focus on

ing that all of the evidence it proposes to use was derived from legitimate independent sources.”⁶¹ “This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.”⁶²

Beyond the broad proscriptions of *Kastigar*, the Court has not yet specifically addressed the possible application of the “attenuation” doctrine to the fruits of immunized testimony. It is certainly possible that at some point the causal relationship between the immunized testimony and the derivative evidence may become so imperceptible that the evidence may be deemed “wholly independent” of that testimony. The difference, then, between “wholly independent” and “attenuated” is simply one of degree.⁶³ It is certainly fair to say that the scope of the ban against evidence derived from immunized testimony is at least as broad, and quite possibly broader, than the scope of the ban on evidence derived from officially coerced confessions.

In any event, the burden upon the government to demonstrate that none of its evidence was derived from the defendant’s immunized testimony is extremely difficult.⁶⁴ In practice, then, very few immunized witnesses are subsequently prosecuted for crimes relating to the subject matter of their immunized testimony.⁶⁵ One commentator has suggested that use/derivative use immunity in practice is virtually indistinguishable from transactional immunity.⁶⁶ Naturally, then, a prosecutor is unlikely to extend immunity to an individual unless the prosecutor is virtually certain that he or she will not prosecute that individual in

the witness as a potential defendant.” UNITED STATES ATTORNEYS’ MANUAL 9-23.330 (1988) [hereinafter MANUAL].

An example of this absolute proscription of any derivative use is *In re Grand Jury Proceedings*, 497 F. Supp. 979 (E.D. Pa. 1980). In that case, an individual named Rosenthal, called to testify as a witness in a bankruptcy proceeding, was ordered to testify by the bankruptcy court pursuant to a then-existing statute conferring automatic use/derivative use immunity upon such witnesses. Following the testimony, the bankruptcy court directed the bankruptcy trustee to apprise the office of the United States Attorney of potential criminal violations, which the trustee did. In an effort to avoid future taint problems, the prosecutor was not advised as to the content of Rosenthal’s immunized testimony or of the basis for the bankruptcy judge’s referral. An investigation was commenced, which eventually led back to Rosenthal. A grand jury subpoena was served upon Rosenthal seeking handwriting exemplars for the purpose of identifying the author of certain writings. The district court granted Rosenthal’s motion to quash the subpoena, finding that the investigation underlying the subpoena was itself a derivative use of Rosenthal’s immunized testimony. *Id.* at 985-89.

61. *Kastigar*, 406 U.S. at 461-62.

62. *Id.* at 460.

63. Humble, *supra* note 48, at 362 n.63.

64. Lushing, *supra* note 3, at 1713-14; Note, *Prospective Determinations of Derived Use in Civil Proceedings: Upsetting the Immunity Balance*, 50 FORDHAM L. REV. 989, 998-99 (1982). That showing is typically made at a pretrial hearing, *United States v. First W. State Bank*, 491 F.2d 780, 787-88 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974); Lushing, *supra* note 3, at 1692, and is sometimes referred to as a *Kastigar* showing or a showing made at a *Kastigar* hearing. Thus, unless and until the government commences a prosecution of the immunized witness, the showing required by *Kastigar* need never be made. See, e.g., *In re Sealed Case*, 791 F.2d 179, 181 (D.C. Cir.), *cert. denied sub nom. Wiggins v. United States*, 479 U.S. 924 (1986).

65. Alito, *Documents and the Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 55-56 (1986); Mykkeltvedt II, *supra* note 20, at 335; Mykkeltvedt I, *supra* note 8, at 655-57; Note, *Federal Witness Immunity Problems*, *supra* note 5, at 282. See also MANUAL, *supra* note 60, at 9-23.000 (describing as “rare case[s] where it can be shown that the supporting evidence clearly was obtained only from independent sources”) (emphasis added).

66. Mykkeltvedt I, *supra* note 8, at 659.

the future for crimes relating to the scope of the immunized testimony.⁶⁷ In short, use/derivative use immunity, consistent with the vision of the authors and proponents of Section 6002 and the *Kastigar* Court, has not functioned as a vehicle for prosecutors to compel testimony from the very individuals who are targeted for prosecution.

Finally, the most pertinent lesson from this history is that use/derivative use immunity is clearly as far as the government may constitutionally go. *Kastigar* makes clear that use/derivative use immunity is merely coextensive with, and not broader than, what the fifth amendment permits.⁶⁸ Although the dicta in *Counselman* requiring transactional immunity is no longer controlling, the actual holding of *Counselman*—that any immunity which permits derivative use of immunized testimony is unconstitutional⁶⁹—remains valid.

II. THE ACT-OF-PRODUCTION PRIVILEGE

Although references to an act-of-production privilege do appear in some earlier Supreme Court opinions,⁷⁰ that concept did not assume true significance until the Court's 1976 decision in *Fisher v. United States*.⁷¹ In *Fisher*, certain taxpayers, the targets of tax investigations, had obtained their accountants' work papers which had been used to prepare their tax returns.⁷² The targets then transferred the papers to their respective attorneys.⁷³ The Government sought to compel the production of these documents by summonses served upon the attorneys.⁷⁴ The attorneys refused to comply, raising various challenges to the summonses, including a claim that production would violate the targets' fifth amendment privilege against self-incrimination.⁷⁵

Insofar as the summonses sought to compel attorneys to produce documents provided to them by clients seeking legal services, the Court examined the potential application of the attorney-client privilege. The question addressed was whether the privileged status of the documents is altered by virtue of their transfer from client to attorney. Essentially, the fact that documents have been transferred to an attorney neither enlarges nor diminishes the client's privilege. If production of the documents could have been obtained directly from the client, then transfer of the documents to legal counsel does not create a privilege—attorney-client or otherwise—against compelled production by the attorney.⁷⁶ However, if production of the documents could not have been obtained

67. Alito, *supra* note 65, at 56; Heidt, *The Fifth Amendment Privilege and Documents—Cutting Fisher's Tangled Line*, 49 MO. L. REV. 439, 488 (1984); Rothman, *Life After Doe? Self-Incrimination and Business Documents*, 56 U. CIN. L. REV. 387, 443 (1987). See also Carlson, *Witness Immunity in Modern Trials: Observations on the Uniform Rule of Criminal Procedure*, 67 J. CRIM. L. & CRIMINOLOGY 131, 134 (1976).

68. *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

69. *Counselman v. Hitchcock*, 142 U.S. 547, 564-66, 586 (1892).

70. See, e.g., *Couch v. United States*, 409 U.S. 322, 346-47 (1973) (Marshall, J., dissenting); *Curcio v. United States*, 354 U.S. 118, 125 (1957).

71. 425 U.S. 391 (1976).

72. *Id.* at 394.

73. *Id.*

74. *Id.* at 394-95.

75. *Id.* at 395.

76. *Id.* at 403-04.

directly from the client, then the attorney-client privilege protects the documents from compelled production following transfer of the documents to counsel.⁷⁷

The real question, then, is whether individuals (in *Fisher*, the targets) enjoy a fifth amendment privilege against the compelled production of documents within their personal possession. This inquiry provided the vehicle for the *Fisher* Court to lay the groundwork for its act-of-production analysis.

Starting with the language of the fifth amendment itself,⁷⁸ the Court reasoned that the privilege against self-incrimination may only be invoked where each of three elements is present: compulsion, testimony,⁷⁹ and incrimination.⁸⁰ Insofar as a target is subpoenaed to produce his accountant's work papers, the element of incrimination may well be present.⁸¹ However, as the work papers are neither created nor adopted by the target, the papers do not constitute the testimony of the target. Thus, the incriminatory aspect of the documents does not run afoul of the fifth amendment, because the papers themselves do not constitute a testimonial communication by the target.⁸²

More importantly, even if the documents are created by the target, and thus can be fairly said to constitute a testimonial communication, the element of governmental compulsion is lacking. Typically, as in *Fisher*, the documents are created voluntarily and not as a result of governmental subpoena or other coercive mechanisms. Thus, the contents of the documents, even though consti-

77. *Id.* at 404-05.

78. U.S. CONST. amend. V provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

79. Historically, the fifth amendment has not barred compelling a person to provide *nontestimonial* self-incriminating evidence. In *Schmerber v. California*, 384 U.S. 757, 763-64 (1966), the Court endorsed the interpretation of the fifth amendment which offered protection against compelled "'communications' or 'testimony,'" but not against the compelled production of "real or physical evidence." On the basis of this distinction, one may be constitutionally compelled, for example, to provide handwriting exemplars, *United States v. Mara*, 410 U.S. 19, 21-22 (1973); *Gilbert v. California*, 388 U.S. 263, 266-67 (1966); to provide voice exemplars, *United States v. Dionisio*, 410 U.S. 1, 5-7 (1973); to stand in a lineup, *United States v. Wade*, 388 U.S. 218, 221-23 (1967); to provide blood samples, *Schmerber*, 384 U.S. at 765; to don incriminating clothing, *Holt v. United States*, 218 U.S. 245, 252-53 (1910); to submit to fingerprinting, *e.g.*, *United States v. Peters*, 687 F.2d 1295, 1297 (10th Cir. 1982); to submit to photographing, *e.g.*, *In re Rosahn*, 671 F.2d 690, 694 (2d Cir. 1982), and to provide hair samples, *id.*

The universe of nontestimonial self-incrimination is not limited to physical evidence. Although most verbal statements are testimonial, *Doe v. United States*, 487 U.S. 201, 213 (1988), "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Id.* at 210 (footnote omitted). In *Doe*, the Court found no fifth amendment violation in a court order (and a subsequent civil contempt order) requiring a target to execute a consent directive directing foreign banks to release to the investigating grand jury the bank records of the target's accounts. The consent directive did not identify any accounts or banks or even acknowledge the existence of any such accounts. *Id.* at 215. Thus, neither the directive nor the compelled act of the target's execution of the directive required the target to communicate any information or assert any facts. *Id.* at 215-16. Nothing in the compelled words of the target constituted an implicit admission by the target as to the existence, possession, or authentication of such bank records; there simply was no communicative quality to the execution of the directive.

For a more detailed discussion of the distinction between testimonial and nontestimonial self-incrimination, see, Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 38-45 (1982); Lushing, *supra* note 3, at 1699-701.

80. *Fisher*, 425 U.S. at 391, 408.

81. *Id.* at 409.

82. *Id.*

tuting testimonial self-incrimination, are generally not shielded by the fifth amendment because of the absence of the element of official compulsion.⁸³

This does not end the inquiry, however. Where an individual produces documents in response to a subpoena or a summons, there is clearly present the element of compulsion.⁸⁴ What is compelled is not the creation of the documents, but rather their production. The question, then, is whether the compelled act of producing evidence satisfies the testimonial and self-incriminatory prongs of the Court's fifth amendment analysis.

In *Fisher*, the Court identified three potential testimonial aspects of the act of production of documents. First, production may constitute implicit testimony by the subpoenaed party that the documents in question do in fact exist.⁸⁵ Second, production may constitute implicit testimony that subpoenaed documents had been in the possession of that party.⁸⁶ And third, production may constitute implicit authentication of the documents, *i.e.*, production may communicate the subpoenaed party's belief that the documents produced are those demanded by the subpoena.⁸⁷

The mere presence of one or more of these implicit communications does not, however, necessarily render the act of production "sufficiently testimonial" to "rise[] to the level of testimony within the protection of the Fifth Amendment."⁸⁸ According to the *Fisher* Court, where the relevant testimonial component—existence, possession, or authentication—is a "foregone conclusion," then the testimonial aspect of the act of production is not protected by the fifth amendment.⁸⁹ The measure of whether the testimonial component is a "foregone conclusion" is whether the act of production "adds little or nothing to the sum total of the Government's information . . ."⁹⁰

If, despite these obstacles, the act of production is sufficiently testimonial to meet that threshold of fifth amendment coverage, there remains the third prong of the Court's test: whether the act of production is self-incriminatory. In *Fisher*, the Court found this element lacking because: (1) there had been no showing that existence or possession of the papers was actually incriminatory, and (2) the taxpayers were not competent to authenticate the work papers of

83. *Id.* at 409-10 & n.11; Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1277 (1988). *Fisher's* analysis regarding the contents of voluntarily prepared documents reemerged two months later in *Andresen v. Maryland*, 427 U.S. 463 (1976). In *Andresen*, the question was whether the seizure of the defendant's personal business records pursuant to a search warrant, and the introduction of those records against the defendant at trial, violated the defendant's fifth amendment privilege against self-incrimination. *Id.* at 465. Applying the three-part test utilized in *Fisher*, the Court acknowledged that the records were both testimonial and incriminating. *Id.* at 471. However, because the records had been created voluntarily, the element of compulsion was lacking. *Id.* at 473. Indeed, because the records were lawfully seized, and were not the subject of a subpoena directed to the defendant, the defendant had not been compelled to do anything whatsoever. *Id.* at 474. Thus, no privilege attached to the records so obtained. *Id.* at 477.

84. *Fisher*, 425 U.S. at 409.

85. *Id.* at 410.

86. *Id.*

87. *Id.*

88. *Id.* at 411.

89. *Id.*

90. *Id.* The meaning of the term "foregone conclusion" is discussed further *infra* at note 96.

the accountants.⁹¹ The Court noted, however, that it was not faced with the issue of determining whether a target could be compelled to produce his own papers in his own possession.⁹²

Fisher thus introduced the following methodology for the analysis of claims of fifth amendment privilege in response to document subpoenas:

First, the elements of compulsion, testimony and self-incrimination are all prerequisites to the application of the fifth amendment;

Second, where documents are voluntarily created, the absence of the element of compulsion precludes application of the fifth amendment to the contents of those documents;

Third, where production of the documents is compelled, the act of production is itself within the ambit of fifth amendment protection, provided that the act of production is sufficiently testimonial and incriminatory;

Fourth, the act of production is testimonial where it implicitly communicates existence, possession or authentication of the documents; and

Fifth, none of these communicative aspects of the act of production is sufficiently testimonial to be covered by the fifth amendment privilege where the relevant aspect is a "foregone conclusion."⁹³

On the other hand, *Fisher* left us with several major unresolved questions. Does the *Fisher* analysis—which finds no privilege in the contents of voluntarily created documents but rather only in the compelled act of their production—apply only to ordinary business records or does it apply as well to private business papers and even to nonbusiness personal documents?⁹⁴ When is the act of production sufficiently testimonial and incriminatory to trigger the applica-

91. *Id.* at 412-13.

92. *Id.* at 414.

93. While this analytical framework arose, and occurs most frequently, in the context of compelled document production, it is not so limited. As the Court noted in *Fisher*, "[i]n the case of a documentary subpoena the only thing compelled is the act of producing the document and the compelled act is the same as the one performed when a chattel . . . is demanded." *Fisher*, 425 U.S. at 410 n.11 (citation omitted). Thus, several cases have applied the *Fisher* analysis in determining whether a fifth amendment privilege exists in the compelled act of production of other than documentary items. *E.g.*, *Baltimore Dep't of Social Servs v. Bouknight*, 110 S. Ct. 900 (1990) (court-ordered production of child); *United States v. Authement*, 607 F.2d 1129 (5th Cir. 1979) (subpoena to produce brass knuckles); *Goldsmith v. Superior Court*, 152 Cal. App. 3d 76, 199 Cal. Rptr. 366 (1984) (subpoena to criminal defendant to produce firearm); *Commonwealth v. Hughes*, 380 Mass. 583, 404 N.E.2d 1239 (court order to criminal defendant to produce firearm), *cert. denied*, 449 U.S. 900 (1980); *State v. Dennis*, 16 Wash. App. 417, 558 P.2d 297 (1976) (production of cocaine at insistence of police officer). *See also* Lefstein, *Incriminating Physical Evidence, The Defense Attorney's Dilemma, and the Need for Rules*, 64 N.C.L. REV. 897, 913 (1986); Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 7 n.15 (1987).

94. The Court's opinion in *Fisher* specifically left this issue unresolved. *Fisher*, 425 U.S. at 414. Justice Brennan authored a separate opinion primarily to limit his agreement to the majority only as to non-private business papers, while distinguishing the contents of personal papers as protected under the fifth amendment. *Id.* at 414-28 (Brennan, J., concurring).

Eight years later, in *United States v. Doe*, 465 U.S. 605 (1984), several members of the Court took the opportunity to express their respective opinions on this issue, albeit in dicta. Justice O'Connor authored a separate concurrence "just to make explicit what is implicit in the analysis [of the majority] opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind." *Id.* at 618 (O'Connor, J., concurring). Justice Marshall, joined by Justice Brennan, took issue with Justice O'Connor's opinion, instead concluding "that under the Fifth Amendment 'there are certain documents no person ought to be compelled to produce at the Government's request.'" *Id.* at 619 (Marshall, J., concurring in part and dissenting in part), quoting *Fisher*, 425 U.S. at 431-32 (Marshall, J., concurring).

The argument that there remains a privilege as to the contents of some voluntarily-created documents stems from *Boyd v. United States*, 116 U.S. 616, 634-35 (1886), where the Court held that the compulsory production of private books and papers violated the fifth amendment privilege against self-incrimination. The rationale of *Boyd*, at least as read by Justice Brennan, was not that the act of production was the result of governmental compulsion, but rather that the fifth amendment was designed to protect an individual's privacy, even as manifested in the recordation of private thoughts. *Id.* at 631-32; *Fisher v. United States*, 425 U.S. 391, 416, 420 (1976) (Brennan, J., dissenting). *But see* Alito, *supra* note 65, at 36 (rationale of *Boyd* was protection of private property); Heidt, *supra* note 67, at 444-50 (same).

While *Fisher* did not expressly overrule *Boyd*, it did both question the continuing vitality of *Boyd*, 116 U.S. at 407, and specifically reject the notion that the fifth amendment is designed to guarantee personal privacy, *id.* at 399; Heidt, *supra* note 67, at 442, 471-72. With the abandonment of this privacy rationale, and the substituted focus upon the compelled act of production, the character of documents' contents should no longer be relevant. As the Court reiterated in *United States v. Doe*, 465 U.S. 605, 612 n.10 (1984), "[i]f the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged."

Given the content-neutral analysis employed in both *Fisher* and *Doe*, several commentators have endorsed Justice O'Connor's view that the privilege against self-incrimination provides no protection for any voluntarily-prepared documents, including private papers. Alito, *supra* note 65, at 44, 54; Mosteller, *supra* note 93, at 5 & n.10; Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 395-96 (1977); Trujillo, *Are a Taxpayer's Private Papers Protected from an IRS Summons Under the Fifth Amendment?*, 59 TEMP. L.Q. 467, 484-85, 492, 495 (1986); Webb & Ferguson, *United States v. Doe: The Supreme Court and the Fifth Amendment*, 16 LOY. U. CHI. L.J. 729, 739 (1985); Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683, 692-94 (1982) [hereinafter Note, *The Rights of Criminal Defendants*]; Note, *Fifth Amendment Privilege for Producing Corporate Documents*, 84 MICH. L. REV. 1544, 1563 (1986). *See also* Heidt, *supra* note 67, at 470-72.

The courts, however, have been more cautious. Several decisions have read *Fisher* (and the Court's later opinion in *Doe*) as precluding any privilege in the contents of private business papers. *E.g.*, *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir.), *cert. denied*, 110 S. Ct. 265 (1989); *United States v. Rue*, 819 F.2d 1488, 1491 n.3, 1492 (8th Cir. 1987); *In re Grand Jury Proceedings*, 801 F.2d 1164, 1167 (9th Cir. 1986); *In re Kave*, 760 F.2d 343, 355 (1st Cir. 1985); *In re Grand Jury Proceedings on February 4, 1982*, 759 F.2d 1418, 1419 (9th Cir. 1985) ("[R]egardless of the precise characterization of the disputed papers, the contents of such documents are not privileged under the fifth amendment in the absence of some showing that creation of the documents was the product of compulsion." (citation omitted)); *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir.), *cert. dismissed*, 473 U.S. 925 (1985); *United States v. Schlansky*, 709 F.2d 1079, 1083 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984); *In re Grand Jury Proceedings*, 626 F.2d 1051, 1055 (1st Cir. 1980); *In re Trader Roe*, 720 F. Supp. 645, 647 (N.D. Ill. 1989) ("Fifth Amendment does not protect the contents of any voluntarily prepared records, regardless of their nature" (footnote omitted)); *United States v. Cates*, 686 F. Supp. 1185, 1190 (D. Md. 1988); *United States v. McCollom*, 651 F. Supp. 1217, 1220-22 (N.D. Ill.), *aff'd*, 815 F.2d 1087 (7th Cir. 1987); *Moll v. United States Life Title Ins. Co.*, 113 F.R.D. 625, 629 (S.D.N.Y. 1987); *United States v. Willis*, 565 F. Supp. 1186, 1196 (S.D. Iowa 1983); *In re January, 1986 Grand Jury*, 155 Ill. App. 3d 445, 451, 508 N.E.2d 277, 280, *appeal denied*, 116 Ill. 2d 555, 515 N.E.2d 109 (1987), *cert. denied*, 484 U.S. 1064 (1988). A few decisions have fully embraced Justice O'Connor's view and rejected a claim of privilege as to the contents of voluntarily-created, personal, non-business papers. *E.g.*, *State ex rel. Hyder v. Superior Court*, 128 Ariz. 253, 255-56, 625 P.2d 316, 318-19 (1981) (personal letters); *State v. Barrett*, 401 N.W.2d 184, 190-91 (Iowa 1987) (personal journals); *State v. Jancsek*, 302 Or. 270, 284-85, 730 P.2d 14, 23 (1986) (personal letter); *Marano v. Holland*, 366 S.E.2d 117, 129 (W. Va. 1988) (autobiography and other papers used for psychological evaluation).

However, some courts, in the absence of an express overruling of *Boyd*, have found some fifth amendment protection for the contents of voluntarily-prepared, private papers. *E.g.*, *United States v. Davis*, 636 F.2d 1028, 1042-43 (5th Cir.), *cert. denied*, 454 U.S. 862 (1981); *In re Grand Jury Proceedings*, 632 F.2d 1033, 1042-44 (3d Cir. 1980); *United States v. Plesons*, 560 F.2d 890, 892-93 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977); *In re Grand Jury Subpoena Duces Tecum Dated May 9, 1990*, 741 F. Supp. 1059, 1068-72 (S.D.N.Y. 1990); *United States v. Darwin Constr. Co.*, 632 F. Supp. 1426, 1428 (D. Md. 1986); *United States v. Katin*, 109 F.R.D. 406, 409 (D. Mass. 1986); *In re Grand Jury Investigation*, 600 F. Supp. 436, 438 (D. Md. 1984); *In re Grand Jury Subpoenas Served February 27, 1984*, 599 F. Supp. 1006, 1011 (E.D. Wash. 1984). These decisions are irreconcilable with the requirement that the privilege is only applicable in the face of some governmental compulsion. *See Fisher*, 425 U.S. at 409-10 & n.11. Moreover, the reliance upon *Boyd* for a distinction governing the contents of private papers is questionable, for the document at issue in *Boyd* was an invoice for shipped merchandise, which was hardly a private paper. *See Boyd v. United States*, 116 U.S. 616, 618 (1886).

tion of the fifth amendment?⁹⁵ What showing must the government make to establish that the testimonial aspect of the act of production is a "foregone conclusion"?⁹⁶

95. If one conceptually isolates the implied testimonial aspect of the act of production (be it existence, possession, authentication, or some combination of the three) from the unprivileged contents of the subpoenaed item, the former is not independently incriminatory. In other words, the existence, possession, or authentication of a completely vacuous item cannot be incriminating; it is always some character or content of the item that is inculpatory.

However, the protection of the privilege extends even to compelled testimony which would furnish a link in the chain of evidence used by the prosecution. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Counselman v. Hitchcock*, 142 U.S. 547, 566 (1892). This principle applies no less to the testimonial component of the act of production. *E.g.*, *United States v. Schlansky*, 709 F.2d 1079, 1084 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984); *In re Grand Jury Proceedings*, 626 F.2d 1051, 1055 (1st Cir. 1980). Where the unprivileged contents of an item are incriminating, the implicit testimony as to existence, possession, or authentication of that item may well furnish an inculpatory link in the chain of evidence against the subpoenaed party.

The existence and authenticity of an item are both necessary links in the introduction of that item into evidence. Consequently, where the contents of an item are incriminating, arguably the implicit testimony as to existence or authenticity will inevitably be incriminatory. *See, e.g.*, *In re Kave*, 760 F.2d 343, 358 (1st Cir. 1985); *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir.), *cert. dismissed*, 473 U.S. 925 (1985); *United States v. Fox*, 721 F.2d 32, 37, 39 (2d Cir. 1983); *In re Grand Jury Proceedings*, 626 F.2d at 1055-56; *United States v. Katin*, 109 F.R.D. 406, 409-10 (D. Mass. 1986). However, when the subpoena describes the subpoenaed item with such particularity that responding is a purely ministerial task requiring no discrimination by the witness, it has been suggested that there is no testimonial component of authentication. Mosteller, *supra* note 93, at 13-15. *But see* Rothman, *supra* note 67, at 439 ("[S]ome identification and selection occurs in every instance. Even when just one document is called for, veracity is critical because identification and selection are unsupervised.") In the event that there is such a testimonially incriminating aspect of the act of production, whether it is sufficiently testimonial to be privileged will depend upon whether the testimonial component (existence or authentication) is a "foregone conclusion." *See infra* note 96.

Where the only testimonial aspect of the act of production is possession, the analysis is more complex. In many cases, the incriminating character of the subpoenaed item is not affected by the target's possession of that item. For example, a written or recorded confession, independently authenticated, does not gain or lose probative value depending upon who is in possession of it. Thus, the implicit admission of possession will constitute testimonial incrimination only where the fact of possession provides some incremental evidence of guilt. This will occur, for example, where the possession of the item is itself illegal, where possession reveals control over the illegally used item, *e.g.*, *State v. Alexander*, 281 N.W.2d 349, 351-52 (Minn. 1979) (court may not order defendants to produce allegedly obscene film in prosecution for exhibiting the film), where possession furthers the inference that the target misappropriated the item to conceal it from the government, *e.g.*, *In re Grand Jury Subpoenas Duces Tecum* Dated June 13, 1983 and June 22, 1983, 722 F.2d 981, 987 (2d Cir. 1983), or where possession supports the inculpatory inference of receipt and knowledge of the contents of documents, *e.g.*, *In re Kave*, 760 F.2d at 358; *In re Grand Jury Subpoenas Duces Tecum* Dated June 13, 1983 and June 22, 1983, 722 F.2d at 987. Of course, even where the implicit acknowledgment of possession constitutes testimonial incrimination in this preliminary sense, the question remains whether possession is insufficiently testimonial because it is a "foregone conclusion." *See infra* note 96.

96. This is a question as to which there is considerable uncertainty. Alito, *supra* note 65, at 49; Mosteller, *supra* note 93, at 3, 9. The sole explication of the concept in *Fisher* was that the implicit testimony inherent in the act of production "add[ed] little or nothing to the sum total of the Government's information . . ." *Fisher v. United States*, 425 U.S. 391, 411 (1976). The apparent focus of this inquiry is upon the incremental value of the implicit testimony, which in turn depends upon the strength of the government's independent evidence regarding the relevant testimonial component. *See, e.g.*, *In re Sealed Case*, 832 F.2d 1268, 1280 (D.C. Cir. 1987) (government must show "that it would be able to prove at trial by independent evidence any possibly incriminatory facts" which are testimonially implicit in the act of production); *United States v. Rue*, 819 F.2d 1488, 1492 (8th Cir. 1987) ("foregone conclusion" analysis "focuses on the information possessed by the IRS regarding the existence, possession, and authenticity of the summoned documents"); *United States v. Edgerton*, 734 F.2d 913, 922-23 (2d Cir. 1984) (whether government can compel production of documents depends "on the extent of the knowledge the government can prove it possesses"); *In re Grand Jury Subpoena Duces Tecum* Dated November 13, 1984, 616 F. Supp. 1159, 1161 (E.D.N.Y. 1985) (no privilege if government can demonstrate that it already knows); *In re Grand Jury Subpoenas Served February 27, 1984*, 599 F. Supp. 1006, 1015-16 (E.D. Wash. 1984) (implicit testimony is not a "foregone conclusion" if it conveys "information the government does not already have"); Heidt, *supra* note 67, at 480 (whether implicit admission is foregone conclusion is determined "in light of the

Perhaps the most interesting issue raised by *Fisher* is nowhere discussed in the Court's opinion. What are the consequences of a grant of use immunity to a

other evidence available to the prosecutor"); Mosteller, *supra* note 93, at 29 ("the extent of prosecutorial knowledge provides the key to the question whether admission of existence through the act of production entails, in any given case, testimonial conduct. That issue is directly addressed in the foregone conclusion concept created by the Court in *Fisher*"); Note, *Fifth Amendment Limitations on the Compelled Production of Evidence*, 25 AM. CRIM. L. REV. 509, 514 (1988); Note, *The Fifth Amendment and Production of Documents After United States v. Doe*, 66 B.U.L. REV. 95, 116 (1986) [hereinafter Note, *Fifth Amendment and Production*] (foregone conclusion analysis "link[s] the accused's ability to invoke the fifth amendment to the strength of the government's case"). The Court apparently confirmed this analysis in *United States v. Doe*, 465 U.S. 605, 614 n.13 (1984), where it affirmed the lower court's finding that the Government's evidence was insufficient to establish that existence, possession, and authentication were a foregone conclusion.

The idea that the availability of the privilege would itself depend upon the availability of independent evidence does not appear to have any historical basis, *see* Rothman, *supra* note 67, at 437, and in fact appears "to be inconsistent with the settled understanding" that the privilege is not limited to merely noncumulative evidence, Alito, *supra* note 65, at 49. Consequently, the "foregone conclusion" concept has drawn some criticism, both from commentators, *see, e.g.*, Heidt, *supra* note 67, at 476 n.151; Mosteller, *supra* note 93, at 31; Rothman, *supra* note 67, at 437-38; Note, *The Rights of Criminal Defendants*, *supra* note 94, at 686-87, and from one member of the Court.

I disagree, however, that implicit admission of the existence and possession or control of the papers in this case is not "testimonial" merely because the Government could readily have otherwise proved existence and possession or control in these cases. I know of no Fifth Amendment principle which makes the testimonial nature of evidence and, therefore, one's protection against incriminating himself, turn on the strength of the Government's case against him.

Fisher, 425 U.S. at 428-29 (Brennan, J., concurring).

To the extent that there is an analogue for the showing the government must make to establish that the testimonial component is a foregone conclusion, it would be the *Kastigar* showing. *See supra* note 64 and accompanying text. In both cases the government must prove that its evidence is "independent" of the compelled testimony. *Cf.* Mosteller, *supra* note 93, at 33-34.

There are, however, important differences. First, while the *Kastigar* showing is made after a privilege has been recognized and immunity conferred, the foregone conclusion showing is made earlier, at the point when the very existence of a privilege is being determined. Second, and perhaps as a corollary of the first distinction, there is no indication that the strict proscription against derivative use governing the *Kastigar* showing plays any part in the foregone conclusion analysis. *See* Mosteller, *supra* note 93, at 34 n.108, 38.

Why has the Court altered the traditional structure of fifth amendment analysis by inserting the foregone conclusion loophole? It has been persuasively suggested that, where the government is solely interested in acquiring the unprivileged contents of a subpoenaed item, and where the testimonial component is merely implicit and inherently incidental to compliance with a subpoena duces tecum, the Court regards the testimonial component as insufficiently related to the true goals of the subpoena to permit frustration of the legitimate acquisition of unprivileged evidence. *See* Mosteller, *supra* note 93, at 32; Rothman, *supra* note 67, at 438. The focus, then, is upon what is truly significant to the government when it serves the subpoena, *i.e.*, what it will acquire that will be of evidentiary significance. Heidt, *supra* note 67, at 481-82; Mosteller, *supra* note 93, at 38. *See also* *United States v. Schlansky*, 709 F.2d 1079, 1083 (6th Cir. 1983) (testimonial component of act of production is foregone conclusion where not "required" for government to introduce evidence), *cert. denied*, 465 U.S. 1099 (1984); *State v. Jancsek*, 302 Or. 270, 288, 730 P.2d 14, 25 (1986) (testimonial component of act of production is foregone conclusion where "not necessary" to government's proof). Consistent with this interpretation, the government must make no use of the testimonial component of the act of production, and in fact must demonstrate that it does not need such testimony. Mosteller, *supra* note 93, at 32-33.

This is most clearly seen when the implicit testimonial component is authentication. Frequently, the government does not need the authentication implicit in the act of production. Once the government actually has the unprivileged item, there will be alternative means of authenticating the item independent of the act of production. *But see, e.g., In re Grand Jury Empaneled March 19, 1980*, 680 F.2d 327, 335 (3d Cir. 1982), *aff'd in part, rev'd in part, sub nom. United States v. Doe*, 465 U.S. 605 (1984). Some courts and commentators have taken the position that the government's ability to authenticate independently does not defeat a claim of privilege, *see, e.g., In re Grand Jury Proceedings*, 626 F.2d 1051, 1056-57 (1st Cir. 1980); Rothman, *supra* note 67, at 440, and that a grant of immunity is necessary to compel production, Note, *The Rights of Criminal Defendants*, *supra* note 94, at 688-90. The prevailing view, however, appears to be that the government's specification of an alternative means of authentication renders authentication a foregone conclusion. *E.g., United States v. Clark*, 847 F.2d 1467, 1473-74 (10th Cir. 1988); *United States Sec. and Exch. Comm. v. First Jersey Sec., Inc.*, 843 F.2d 74, 76 (2d Cir.

witness holding only an act-of-production privilege? What evidentiary use may be made of the contents of evidence acquired pursuant to a grant of act-of-production immunity?⁹⁷

Eight years after *Fisher*, in *United States v. Doe*,⁹⁸ the Court once again addressed the subject of an act-of-production privilege. In *Doe*, several subpoe-

1988); *Rue*, 819 F.2d at 1494; *United States v. Lang*, 792 F.2d 1235, 1241 (4th Cir.) *cert. denied*, 479 U.S. 985 (1986); *Schlansky*, 709 F.2d at 1083; *In re Grand Jury Subpoena Duces Tecum* Dated November 13, 1984, 616 F. Supp. at 1161-62; *In re Grand Jury Subpoenas* served February 27, 1984, 599 F. Supp. at 1016-17.

The latter position appears to have been endorsed by the Supreme Court in its most recent act of production decision. In *Baltimore Dep't of Social Servs. v. Bouknight*, 110 S. Ct. 900 (1990), the Court addressed a claim of act-of-production privilege in response to a juvenile court order to produce a child in the custody of the respondent. In the course of its discussion, the Court noted that no privilege exists as to the "contents or the nature of the thing demanded." *Id.* at 905. Therefore the respondent could not claim a privilege as to the existence or authenticity of the child because both could be readily established by an examination of the child. *Id.*

Perhaps the most difficult and unsettled issue is the nature and quantity of the evidence that must be produced by the government in order to establish that the relevant testimonial component—be it existence, possession, or authentication—is a foregone conclusion. Various formulations of the government's evidentiary burden have been used. *E.g.*, *United States v. Anello*, 765 F.2d 253, 260 (1st Cir.) (existence is foregone conclusion where "no doubt" that item exists), *cert. denied*, 474 U.S. 996 (1985); *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir.) (existence is foregone conclusion where "no serious doubt" that items exist), *cert. dismissed*, 473 U.S. 925 (1985); *United States v. Fox*, 721 F.2d 32, 37-38 (2d Cir. 1983) (government's pre-production knowledge must be "enough to eliminate any possibility" of incrimination); *Schlansky*, 709 F.2d at 1083 (existence is foregone conclusion where "no serious question" that items exist); *In re Grand Jury Empanelled on March 19, 1980*, 680 F.2d 327, 335 (3d Cir. 1982) (possession not a foregone conclusion where government has not shown possession "as a certainty"), *aff'd in relevant part sub nom. United States v. Doe*, 465 U.S. 605 (1984); *United States v. Katin*, 109 F.R.D. 406, 409 (D. Mass. 1986) (existence not a foregone conclusion where government not "certain" of existence of documents); *State v. Alexander*, 281 N.W.2d 349, 352 (Minn. 1979) (possession not a foregone conclusion where state's evidence insufficient "to prove [control] beyond a reasonable doubt"). There is, however, no consensus on this issue.

In some cases, the nature of the "foregone conclusion" inquiry has focused upon the inherent quality of the subpoenaed item. *E.g.*, *United States v. Bengivenga*, 845 F.2d 593, 600-01 (5th Cir.) (foregone conclusion that bus ticket exists and is in possession of bus passenger), *cert. denied*, 488 U.S. 924 (1988); *Katin*, 109 F.R.D. at 409 (foregone conclusion that legal documents regarding immigration and naturalization exist and are in possession of naturalized citizen). In other cases, such evidence has been found insufficient. *E.g.*, *Fox*, 721 F.2d at 37-38 (general rule that medical practitioners keep records of fees insufficient; government must establish that it knows of existence and possession of such records by individual in question).

In most cases, the inquiry has been more ad hoc, focusing upon the government's knowledge in a particular circumstance rather than upon the inherent qualities of the subpoenaed items. *See, e.g.*, *Clark*, 847 F.2d at 1472-73; *First Jersey Sec.*, 843 F.2d at 76-77 (existence and possession of certain documents by branch manager a foregone conclusion where parallel documents held by other branch managers); *In re Grand Jury Subpoenas Duces Tecum*, August 1986, 658 F. Supp. 474, 482 (D. Md. 1987) (admission of possession in 1980 and 1984 does not render possession in 1986 a foregone conclusion); *In re Grand Jury Subpoena Duces Tecum* Dated November 13, 1984, 616 F. Supp. at 1161 (existence and possession of business records a foregone conclusion where government is aware that subpoenaed party has second bank account and second set of records). One relatively consistent result has been that a voluntary admission of the relevant testimonial component to a government agent or to a third party by the subpoenaed party or his attorney renders that testimonial component a foregone conclusion. *See, e.g.*, *Rue*, 819 F.2d at 1492-93; *United States v. McCollom*, 651 F. Supp. 1217, 1223 (N.D. Ill.), *aff'd*, 815 F.2d 1087 (7th Cir. 1987); *United States v. Friedman*, 638 F. Supp. 816, 818 (S.D.N.Y. 1986), *cert. denied*, 490 U.S. 1004 (1989); *Jancsek*, 302 Or. at 284-85, 730 P.2d at 23. *See also Rosenblatt, The Production of Business Records After Braswell: Where We've Been, Where We Are, Where We May Be Going*, 67 TAXES 231, 237 (April 1989) (cautioning counsel that their conversations with prosecutors and law enforcement agents regarding the identity, existence, and whereabouts of subpoenaed records may result in the loss of their clients' act-of-production privilege).

97. While the majority opinion did not address the immunity issue, Justice Marshall, promoting the idea that act-of-production immunity would generally continue to provide protection of the contents of documents, did just that in a separate concurrence. *Fisher*, 425 U.S. at 433-34 (Marshall, J., concurring). Justice Marshall's theory is summarized *infra* at notes 169-76, and accompanying text.

98. 465 U.S. 605 (1984).

nas were served upon the owner of sole proprietorships, commanding the production of telephone, bank, and business records.⁹⁹ Despite the factual distinctions between the *Fisher* and *Doe* scenarios,¹⁰⁰ the Court remained faithful to its *Fisher* analysis.

First, because the subpoenaed records were prepared voluntarily, no compulsion was present.¹⁰¹ Consequently, even though the contents of the records were both testimonial and incriminating,¹⁰² the absence of the component of compulsion deprived the contents of the records of any fifth amendment protection.¹⁰³

Second, the inquiry then turned to the act of production itself. The subpoena plainly provided the requisite governmental compulsion.¹⁰⁴ Furthermore, the District Court had specifically found that the act of producing the records would constitute testimonial self-incrimination in that production would have implicitly admitted that the records existed, that they were in the target's possession, and that they were authentic.¹⁰⁵ The Court of Appeals endorsed the District Court's findings.¹⁰⁶ The Supreme Court, relying upon the principles of deference to factual findings made by the trial court and a reluctance to disturb determinations made at both the district and circuit court levels, concurred with the lower courts that the act of production was sufficiently testimonial and incriminating to come within the ambit of the fifth amendment.¹⁰⁷

Third, despite the compelled testimonial and incriminatory aspects of the act of production, the Government could have rendered the implicit testimonial component constitutionally insufficient by establishing that existence, possession, and authentication were "foregone conclusion[s]."¹⁰⁸ In *Doe*, however, no such showing was made by the Government.¹⁰⁹

Doe thus presented a scenario in which the *Fisher* analysis produced a different result than that reached in *Fisher* itself. The subpoenaed party in *Doe*,

99. *Id.* at 606-07. *Doe* thus presented an issue previewed, but not actually presented, in *Fisher*. In *Fisher*, the summons directed production by an attorney of records of an accountant relating to the business of the individual claiming a privilege. In *Doe*, the subpoena sought production directly from the target individual of his own records in his possession. *Id.* at 610.

100. *Id.*

101. *Doe*, 465 U.S. at 610.

102. *Id.* at 608.

103. *Id.* at 612 n.10.

104. *Id.*

105. *Id.* at 613 & n.11. *In re Grand Jury Empanelled March 19, 1980*, 541 F. Supp. 1, 3 (D.N.J. 1981).

106. *Doe*, 465 U.S. at 613 & n.12. *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 335-36 (3d Cir. 1982).

107. *Doe*, 465 U.S. at 614. The deference afforded the lower courts' findings absolved the Court of the task of supplying criteria for determining when the act of production is sufficiently testimonial and incriminating. Nevertheless, the Court's opinion does suggest that the showing that must be made by the party claiming the privilege is fairly minimal.

Respondent did not concede in the District Court that the records listed in the subpoena actually existed or were in his possession. Respondent argued that by producing the records, he would tacitly admit their existence and his possession. Respondent also pointed out that if the Government obtained the documents from another source, it would have to authenticate them before they would be admissible at trial. By producing the documents, respondent would relieve the Government of the need for authentication.

Id. at 614 n.13 (citation omitted).

108. *Id.*, quoting from *Fisher v. United States*, 425 U.S. 391, 411 (1976).

109. *Doe*, 465 U.S. at 614 n.13.

like the taxpayer in *Fisher*, enjoyed no fifth amendment privilege as to the contents of the subpoenaed documents. However, because the act of production in *Doe* was a testimonial communication, implicitly acknowledging existence, possession, and authentication, the compelled act of production was barred by the fifth amendment. In this sense, the subpoenaed party in *Doe* may fairly be described as having invoked an "act-of-production" privilege.

Of course, even privileged testimony may be compelled when accompanied by a grant of use immunity.¹¹⁰ In *Doe*, the Government chose not to utilize statutory use immunity. Instead, the Government urged the courts "to adopt a doctrine of constructive use immunity,"¹¹¹ whereby the Government, without proceeding in accordance with Sections 6002 and 6003,¹¹² would nevertheless be estopped from making evidentiary use of the privileged components of the act of production against the party claiming the privilege.¹¹³ This the Court refused to do, instead referring the Government to the relevant statutes as the exclusive mechanism for compelling testimony pursuant to a grant of immunity.¹¹⁴

The Court's conclusions left open the possibility that, following remand to the trial court, the Government would choose to extend to the target statutory use immunity. What would such a grant actually immunize? The *Doe* Court took the opportunity to provide some cursory guidance on this critical issue.

Respondent argues that any grant of use immunity must cover the contents of the documents as well as the act of production. We find this contention unfounded. To satisfy the requirements of the Fifth Amendment, a grant of immunity need be only as broad as the privilege against self-incrimination. As discussed above, the privilege in this case extends only to the act of production. Therefore, any grant of use immunity need only protect respondent from the self-incrimination that might accompany the act of producing his business records.¹¹⁵

Insofar as the *Doe* Court has indicated that the government need only immunize the privileged act of production, and not the unprivileged contents of the documents, the Court is plainly right. The question, however, is not whether the unprivileged contents are directly immunized. The real issue is whether, and under what circumstances, the contents constitute a derivative use of the privileged act of production. To the extent that the contents are such a derivative use, then a grant of use/derivative use immunity to compel the otherwise privi-

110. See *supra* note 3 and accompanying text.

111. *Doe*, 465 U.S. at 615-16.

112. Title 18 U.S.C. §§ 6002 and 6003, discussed *supra* at notes 24-69 and accompanying text.

113. *Doe*, 465 U.S. at 616.

114. *Id.* at 616-17. In its opinion, the Court noted that

[d]espite repeated questioning at oral argument, counsel for the Government gave no plausible explanation for the failure to request official use immunity rather than promising that the act of producing the documents would not be used against respondent.

Id. at 616 n.15. Despite the apparently inexplicable failure of the Government to pursue statutory immunity, there is in fact a plausible explanation for that decision. Nothing in either of the Court's opinions in *Fisher* and *Doe* resolves the question of the effect of a grant of act-of-production immunity. Rosenblatt, *supra* note 96, at 235-36. Thus, the Government may well have been reluctant to extend to the target statutory use immunity for fear that such immunity would preclude not only direct evidentiary use of the target's act of production, but also preclude derivative use of the contents of the documents themselves. *Id.*; see also Note, *Organizational Papers and the Privilege Against Self-Incrimination*, 99 HARV. L. REV. 640, 651 (1986). This, of course, is precisely the issue addressed in this Article.

115. *Doe*, 465 U.S. at 617 n.17 (citations omitted).

leged act of production will preclude use of the contents against the immunized witness. The task, then, is to apply the concept of "derivative use" to the limited, act-of-production privilege. The result will be a new form of immunity sometimes referred to as "act-of-production immunity."¹¹⁶

III. EXISTING THEORIES OF ACT-OF-PRODUCTION IMMUNITY

The scope of act-of-production immunity is not easily defined. In fact, several sharply conflicting alternatives have thus far been advanced. Four such theories merit examination here.

A. *The Government Approach*

The government which confers immunity has an obvious interest in compelling production of evidence with as little cost to itself as possible. In the circumstance where the holder of an act-of-production privilege must be accorded act-of-production immunity, the government quite understandably would wish to limit the immunization solely to the act of production itself, without any restriction on the government's use of the contents of the subpoenaed items. This appears to be the view taken by the United States Department of Justice.

If immunity is sought for the limited purpose of obtaining records pursuant to *United States v. Doe*, [], that fact should be clearly stated in the application for immunity. Examination of a witness who is compelled to produce records in such cases should be sufficient to determine whether there has been compliance with the subpoena, but care should be taken to limit inquiries to matters relevant to the act of producing the records since all such testimony, and leads therefrom, will not be usable against the witness. *The contents of the records may, of course, be used for any purpose because they are not privileged.*¹¹⁷

Conceptually, this view requires a complete separation of the privileged act of production from the unprivileged contents of the subpoenaed item. Use/derivative use immunity obviously precludes direct or indirect use of the act of production.¹¹⁸ But because immunity is only constitutionally required to leave the witness "in substantially the same position as if the witness had claimed the Fifth Amendment,"¹¹⁹ then act-of-production immunity is constitutionally sufficient if we theoretically eliminate the witness's act of production from the information possessed by the government.¹²⁰ And, the argument goes, because the

116. See, e.g., Alito, *supra* note 65, at 29 n.4.

117. MANUAL, *supra* note 60, at 9-23.215 (emphasis added). This position has actually been advanced by the United States on at least one specific occasion. See Brief for Appellant at 9-18, *In re Sealed Case*, 791 F.2d 179 (D.C. Cir.) (No. 85-5755), cert. denied, 479 U.S. 924 (1986) [hereinafter Brief]. The author was the Assistant United States Attorney who represented the Government on the above appeal. As is apparent from this Article, the author's views on the proper scope of act-of-production immunity have changed since the filing of the brief in that case. The position of the Justice Department, however, remains.

118. This would include a prohibition against linking the subpoenaed items to the witness solely on the basis of the act of production, Alito, *supra* note 65, at 63-64, or even focusing the investigation upon the witness as a result of that link, Heidt, *supra* note 67, at 482 n.172.

119. *Kastigar v. United States*, 406 U.S. 441, 462 (1972).

120. See Ritchie, *supra* note 94, at 395.

contents of the subpoenaed items are conceptually independent of the act of production, the remaining contents are fully usable by the government.¹²¹

By analogy, it has been suggested that one imagine the subpoenaed items magically appearing before the grand jury.¹²² Under such circumstances, there would be no act of production, and therefore no implicit testimony as to the existence, possession, or authentication of the subpoenaed items. The government would have only the unprivileged items themselves, and the contents of such items would not be derived from, nor tainted by, any privileged act of production.

Although only hypothetical, the argument is that this situation can essentially be recreated by a grant of act-of-production immunity. The government immunizes only the act of production, which essentially means pretending that it never happened. Immunity, then, is essentially statutory amnesia. The government must build its case without reference to the source of the subpoenaed items, making neither direct nor indirect use of the act of production itself. But because the contents of the subpoenaed items are entirely distinct from the act of production, such contents do not constitute a derivative use of the immunized act of production.¹²³

Indeed, because of the complete metaphysical separation of the contents from the act of production, this approach permits the government to use the contents to prove the very testimonial fact which rendered the act of production privileged. Facts revealed in immunized testimony may nevertheless be proved by evidence derived from sources wholly independent of the immunized testimony.¹²⁴ Because the government approach treats the contents of the subpoenaed items as wholly independent sources, they may be used to prove the privileged information revealed by the act of production.¹²⁵

Suppose, for example, that the act of producing certain documents is privileged because production constitutes implicit testimony as to the existence of the documents. Under the Government approach, a grant of use/derivative use immunity would prevent any direct or indirect use of the act of production, but would leave the government with the documents themselves, albeit completely divorced from the circumstances of their acquisition. The government may then prove the existence of the documents from the documents themselves.¹²⁶

In fact, because existence is manifest once the subpoenaed items are actually in the government's possession, where the only testimonial component of the act of production is existence, use/derivative use immunity would cost the government absolutely nothing. The corollary is that where the only testimonial component is existence, the fifth amendment privilege is completely worthless to

121. See Alito, *supra* note 65, at 57-58.

122. *Id.* at 60; Brief, *supra* note 117, at 17.

123. See Alito, *supra* note 65, at 57-58. See also Note, *supra* note 114, at 651 ("Although a document's contents are clearly derived from the act of production, the contents are not derived from the act-of-production testimony Because *Fisher* protects only act-of-production evidence that is testimonial, a grant of immunity for a person's act of production would not encompass the document's contents.").

124. *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

125. Alito, *supra* note 65, at 59. See also Note, *Fifth Amendment and Production*, *supra* note 96, at 129.

126. Alito, *supra* note 65, at 59.

the witness. The witness's privileged, implicit testimony that the subpoenaed items exist may be immunized, and the witness may then be compelled to produce items the existence of which is then both apparent and readily provable.

The same analysis would apply when the testimony implicit in the act of production includes possession or authentication, although the results would vary from case to case. Where the testimonial component is possession, the government would be precluded from proving possession by relying directly or indirectly upon the immunized act of production. However, the contents of the subpoenaed item would constitute an independent source which might well provide proof of possession. This could be accomplished directly where, for example, a subpoenaed document on its face reveals the identity of the producing witness. It could also be accomplished indirectly where, for example, the subpoenaed item has some identifying characteristic which, or reveals an alternative witness who, can establish the identity of the producing witness.

Where the testimonial component is authentication, the same possibilities exist. The subpoenaed item may be self-authenticating or may provide some evidence which leads to a form of authentication alternative to the immunized act of production. Examples of such would include serial numbers on registered items, fingerprint or other identifying forensic evidence obtained from the subpoenaed item, and alternative authenticating witnesses identified from the contents of the subpoenaed item.

In any of these situations, it is readily apparent that the protection afforded by the grant of act-of-production immunity is potentially illusory. Notwithstanding the fact that the witness holds a valid privilege against self-incrimination, by a grant of act-of-production immunity the witness may be compelled to produce evidence which, in certain circumstances, may be used against that very witness to prove the very matter that was privileged.¹²⁷ If use/derivative use immunity is only constitutionally acceptable because it places the witness in as good a position as if the witness continued to assert a claim of privilege,¹²⁸ then the Government approach to act-of-production immunity should not survive constitutional scrutiny.¹²⁹

More particularly, the premise of the Government approach—that the contents of the subpoenaed item constitute a source of evidence independent of the immunized act of production—is inconsistent with the original conception of derivative use. The drafters of Section 6002 envisioned that the prohibition against derivative use of immunized testimony would parallel the exclusion of evidence indirectly obtained as a result of a constitutional violation, pursuant to

127. In the ordinary use/derivative use immunity situation, it is neither contemplated nor practicable that the immunized witness will be prosecuted. See *supra* notes 64-67 and accompanying text. In fact, the Justice Department prohibits prosecution of immunized witnesses without written authorization of the Attorney General. *MANUAL*, *supra* note 60, at 9-23.400. However, where the grant of immunity is limited to the act of production, no such authorization is required. *Id.* The Government approach to act-of-production immunity thus envisions act-of-production immunity as an unprecedented tool for immunizing, and thereby acquiring evidence from, the target of the investigation.

128. *Kastigar*, 406 U.S. at 462.

129. See Note, *Fifth Amendment and Production*, *supra* note 96, at 130.

the "fruits of the poisonous tree doctrine."¹³⁰ Yet the result envisioned under the Government approach to act-of-production immunity does not in fact parallel the outcome in a comparable suppression situation.

Suppose, for example, that police officers unconstitutionally coerce a confession to murder from an individual, who simultaneously is coerced to produce a firearm, indicating at the time of production that the firearm is in fact the murder weapon. As the confession was illegally acquired, the verbal and nonverbal testimonial conduct of the individual would obviously be suppressed. It should be equally clear that, absent an independent source for the firearm, the firearm itself would be suppressed as the tainted fruit of the coerced admissions.¹³¹

For the purpose of determining the scope of the prohibition against derivative use, the grant of immunity should parallel the illegally coerced production of the firearm. In the latter situation, the firearm itself is the tainted fruit of the fifth amendment violation. Yet under the Government approach, which treats the contents of the subpoenaed items as independent of the immunized act of production, the firearm would not be a derivative use. This anomaly was neither intended by Section 6002¹³² nor permitted by the fifth amendment.¹³³

Despite the critical deficiencies of the Government approach, there appears to be support for it in some judicial opinions.¹³⁴ Several of the lower courts which have indicated some support for the Government approach have apparently read *United States v. Doe*¹³⁵ as dictating such a result.¹³⁶ That reliance is unjustified.

130. See *supra* notes 40-51 and accompanying text.

131. See, e.g., *United States v. Lee*, 699 F.2d 466, 468 (9th Cir. 1982) (excluding lead pipe obtained as result of illegally obtained admissions); *United States ex rel. Hudson v. Cannon*, 529 F.2d 890, 892 (7th Cir. 1976) (witness testimony must be suppressed where identity of witnesses was derived from illegally acquired confession); *United States v. Guarino*, 629 F. Supp. 320, 326 (D. Conn. 1986) (where police officers illegally obtained certain admissions from defendant, including defendant's pointing to location of concealed cocaine, cocaine excluded as tainted fruit); *United States v. Massey*, 437 F. Supp. 843, 862 (M.D. Fla. 1977) ("all indirect evidence, testimonial and tangible, acquired from Massey's admissions must be excluded as the tainted fruit of the disregard of his Fifth and Sixth Amendment rights").

132. See *supra* notes 49-51 and accompanying text. There is additional irony here. Prior to the creation of use/derivative use immunity, the government would have been in a superior position following an illegally obtained confession than it would have been in following a grant of transactional immunity. See *supra* note 48 and accompanying text. Use/derivative use immunity was intended to remedy that incongruity and create consistent results, without regard to whether the governmental compulsion comes in the form of illegal coercion or a grant of immunity. The Government approach to act-of-production immunity would create a new imbalance, placing the government in a superior position following a grant of act-of-production immunity than it would have been in following an unauthorized compulsion.

133. See *supra* notes 68-69 and accompanying text.

134. See, e.g., *United States v. Crowson*, 828 F.2d 1427, 1429 n.3 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988); *Butcher v. Bailey*, 753 F.2d 465, 470 n.7 (6th Cir.), *cert. dismissed*, 473 U.S. 925 (1985); *United States v. Porter*, 711 F.2d 1397, 1403 (7th Cir. 1983), *cert. denied*, 479 U.S. 924 (1986); *In re Grand Jury Proceedings*, 626 F.2d 1051, 1058 (1st Cir. 1980); *In re Trader Roe*, 720 F. Supp. 645, 648-49 (N.D. Ill. 1989); *United States v. McCollom*, 651 F. Supp. 1217, 1223 (N.D. Ill.), *aff'd*, 815 F.2d 1087 (7th Cir. 1987); *United States v. McPhaul*, 617 F. Supp. 58, 60 (W.D.N.C. 1985), *appeal dismissed*, 786 F.2d 1158 (4th Cir. 1986); *In re January, 1986 Grand Jury*, No. 217, 155 Ill. App. 3d 445, 451, 508 N.E.2d 277, 281, *appeal dismissed*, 116 Ill. 2d 555, 515 N.E.2d 109 (1987), *cert. denied*, 484 U.S. 1064 (1988).

135. 465 U.S. 605 (1984). In particular, reliance is placed upon the Court's footnote indicating that a grant of immunity need only cover the privileged act of production and not the unprivileged contents. *Id.* at 617 n.17. See *supra* note 116, and accompanying text.

136. For cases relying upon *Doe*, see *Crowson*, 828 F.2d at 1429 n.3; *McPhaul*, 617 F. Supp. at 60; *In re*

Doe reaffirmed that the contents of voluntarily-created documents are not privileged.¹³⁷ Consequently, the contents need not be immunized.¹³⁸ It does not follow, however, that the unprivileged and non-immunized contents cannot be a derivative use of the immunized act of production.¹³⁹

[T]he fact that the contents . . . are *unprivileged* does not mean that they will necessarily remain *untainted*. If the government prosecutes the appellee in the future, it will have to meet the "heavy burden," *Kastigar*, 406 U.S. at 461, 92 S.Ct. at 1665, of proving that all evidence it seeks to introduce is untainted by the immunized act of production.

. . . [I]f in fact appellee's privilege in the act of production cannot be protected without excluding the contents . . . the District Court has the authority to prevent the government from referring to or introducing those contents.¹⁴⁰

In fact, the Court's more recent decision in *Braswell v. United States*¹⁴¹ implicitly suggests that derivative use in the context of act-of-production immunity may well extend beyond the limited perimeters of the Government approach. *Braswell* presented the question of "whether the custodian of corporate records may resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment."¹⁴² Ironically, while the Government successfully argued that the custodian may not refuse production on this ground, the court's opinion did not bode well for the Government approach to act-of-production immunity.

Long before the advent of the act-of-production privilege, the Court had determined that collective entities enjoy no fifth amendment privilege.¹⁴³ Thus, pursuant to the collective entity doctrine, a corporation or other collective entity could not refuse compliance with a subpoena duces tecum based upon the privi-

Two other courts grounded their decisions, in whole or in part, upon the conclusion, purportedly derived from *Fisher v. United States*, 425 U.S. 391 (1976), that the contents of documents are not "testimony." *Porter*, 711 F.2d at 1403 n.4; *In re Grand Jury Proceedings*, 626 F.2d at 1058. While it is true that Section 6002 was intended to bar derivative use of testimonial information, H.R. 1549, 91st Cong., 2d Sess., 1970 U.S. CODE CONG. & ADMIN. NEWS at 4017-18, the conclusion that the contents of documents are not testimonial is not only unsupported by *Fisher*, but it is also plainly wrong.

Fisher held that a taxpayer's accountant's workpapers did not constitute testimony of the taxpayer because the workpapers did not contain the statements of the taxpayer himself. *Fisher*, 425 U.S. at 409. That rationale cannot justify the conclusions in *Porter* and in *In re Grand Jury Proceedings*, wherein the subpoenaed documents included papers prepared by the subpoenaed parties.

Fisher also held that the contents of voluntarily-created documents are not privileged because they are not the product of governmental compulsion. *Fisher*, 425 U.S. at 409-10. Thus, even if the documents are prepared by the subpoenaed party, unless the government compels their creation, no privilege exists. While this may prevent the contents from being privileged, it does not preclude the contents from qualifying as testimonial, derivative evidence of an immunized act of production. Indeed, it should be manifest that written, recorded, or transcribed verbalizations are no less testimonial than the same words communicated orally.

137. *Doe*, 465 U.S. at 610-12. See *supra* notes 101-03 and accompanying text.

138. *Doe*, 465 U.S. at 617 n.17. See *supra* note 115 and accompanying text.

139. See Mosteller, *supra* note 93, at 46 n.139.

140. *In re Sealed Case*, 791 F.2d 179, 182 (D.C. Cir.) (opinion of the court by Scalia, J.), *cert. denied*, 479 U.S. 924 (1986).

141. 487 U.S. 99 (1988).

142. *Id.* at 100.

143. *Bellis v. United States*, 417 U.S. 85 (1974) (partnerships); *United States v. White*, 322 U.S. 694 (1944) (labor unions); *Hale v. Henkel*, 201 U.S. 43 (1906) (corporations).

lege against self-incrimination. Furthermore, an individual records custodian could not assert a personal fifth amendment privilege to block production of corporate records, without regard to whether the subpoena is addressed to the corporation¹⁴⁴ or to the individual custodian.¹⁴⁵ In either case, the custodian was regarded as holding the subpoenaed documents merely as an agent of the collective entity, which left the custodian with no personal privilege.¹⁴⁶

Braswell was the president and sole shareholder of two corporations.¹⁴⁷ He was served with a subpoena to produce the books and records of those corporations.¹⁴⁸ Relying upon intervening recognition of the act-of-production privilege, Braswell challenged the continuing vitality of the collective entity doctrine as applied to records custodians. Conceding that no corporate privilege existed, and notwithstanding the fact that no privilege existed as to the contents of the subpoenaed documents,¹⁴⁹ Braswell nevertheless argued that his individual, compelled act of production constituted implicit testimony which was incriminatory, and hence privileged.¹⁵⁰

The Court rejected Braswell's position, reaffirming the preeminence of the collective entity doctrine even in the wake of the Court's act-of-production decisions in *Fisher* and *Doe*. The Court rested its conclusion in part upon the detrimental impact a contrary decision would have upon the government's ability to prosecute white-collar crime.¹⁵¹ Of course, even if the Court had recognized an act-of-production privilege held by the records custodian, the government could still acquire the entity records by conferring act-of-production immunity upon the custodian. Although the Court recognized this, it expressed concern that the proscription against derivative use of immunized testimony might seriously interfere with the government's capacity successfully to prosecute the custodian.¹⁵²

Notwithstanding the fact that the records custodian enjoys no privilege to refuse production of entity records, the Court did extend certain benefits to such custodians. Because such individuals produce subpoenaed evidence solely in their representative capacities on behalf of their employing entities, the Court directed that the act of production be deemed that of the entity and not of the individual custodian.¹⁵³ Consequently, in a prosecution of the individual custodian, the government "may not introduce into evidence before the jury the fact

144. *Wilson v. United States*, 221 U.S. 361 (1911).

145. *Bellis*, 417 U.S. at 101; *Dreier v. United States*, 221 U.S. 394 (1911).

146. *Dreier*, 221 U.S. at 400; *Wilson*, 221 U.S. at 384-85.

147. *Braswell v. United States*, 487 U.S. 99, 101 (1988).

148. *Id.*

149. *Id.* at 102.

150. *Id.* at 102-03, 109.

151. *Id.* at 115.

152. *Id.* at 117.

153. A similar limitation was suggested in *Baltimore Dep't of Social Servs. v. Bouknight*, 110 S.Ct. 900, 908 (1990), where the Court left open the possibility of limitations upon the government's ability to make evidentiary use of a mother's unprivileged act of producing a child pursuant to a court order.

that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian."¹⁵⁴

Although *Braswell* does not explicitly address the scope of act-of-production immunity, there is much implicit significance to the decision on this issue. The Court refused to recognize an act-of-production privilege on the part of entity records custodians, in part because it did not wish to provoke grants of act-of-production immunity and thereby prevent the Government from making derivative use of the individual's act of production. However, the Court did not hesitate to prevent the Government from making direct evidentiary use of the individual's act of production. It would appear, then, that the Court envisioned the proscription against derivative use following a grant of act-of-production immunity to encompass much more than a bar against direct evidentiary use of the act of production.¹⁵⁵ If in fact the Court envisioned the scope of act-of-production immunity to be as narrow as the Government approach suggests, then a grant of act-of-production immunity would, in most cases,¹⁵⁶ be no more consequential than the constructive immunity bestowed by the *Braswell* Court upon records custodians.¹⁵⁷ Arguably, the *Braswell* Court's substitution of its constructive limitation upon use of the custodian's act of production signals a recognition, or at least a concern, that the contents of subpoenaed items may well constitute a derivative use of immunized acts of production in more circumstances than the Government approach would allow.

While one can draw competing inferences from *Doe*, *Braswell*, and elsewhere concerning the Court's (or individual Justices') views on the proper scope of act-of-production immunity, the fact remains that the Court has not yet specifically addressed the issue. Lower courts which have endorsed the Government approach based upon the cursory footnote in *Doe*¹⁵⁸ have taken far too facile an approach to the problem. The Government approach, measured against both the

154. *Braswell*, 487 U.S. at 118. The government would be permitted to use the entity's act of production (i.e., that the evidence in question was produced by the entity) against the individual. *Id.*

155. See Rosenblatt, *supra* note 96, at 236; Comment, *Braswell v. United States: The Collective Entity Doctrine and the Compelled Testimony Standard*, 16 HASTINGS CONST. L.Q. 553, 574, 578 (1989).

156. The only cases where a grant of act-of-production immunity would be problematic for the government under the Government approach would be where the testimonial component of the act of production is both necessary to the government's case and not evident from the contents of the subpoenaed items. See *supra* notes 123-25 and accompanying text.

157. This arguably appears to be the view of the four dissenters in *Braswell*. In his dissenting opinion, which was joined by Justices Brennan, Marshall, and Scalia, Justice Kennedy took issue with the majority's position that requiring the government to confer act-of-production immunity upon records custodians would significantly interfere with the government's ability to prosecute the custodian. *Braswell*, 487 U.S. at 129-30 (Kennedy, J., dissenting). Specifically, the dissenting opinion suggests that, even after a grant of act-of-production immunity, the government "would be free to use the contents of the records against everyone." *Id.* at 130.

To the extent that this is an endorsement of the Government approach to the scope of act-of-production immunity, it seems unlikely that Justices Marshall or Scalia would consciously endorse such a position. Justice Marshall specifically rejected that view in his concurring opinion in *Fisher v. United States*, 425 U.S. 391, 430-34 (1976). See *supra* note 97 and accompanying text, and *infra* notes 169-76 and accompanying text. Justice Scalia apparently rejected the Government approach to the scope of act-of-production immunity as a Circuit Judge writing for the Court of Appeals for the District of Columbia Circuit in *In re Sealed Case*, 791 F.2d 179, 182 (D.C. Cir.), cert. denied, 479 U.S. 924 (1986). See *supra* note 140 and accompanying text.

158. *United States v. Doe*, 465 U.S. 605, 617 n.17 (1984), discussed *supra* at notes 115, 133-39 and accompanying text.

legislative intent behind Section 6002¹⁵⁹ and the constitutional prerequisites for a grant of immunity¹⁶⁰ is insufficiently solicitous of the rights of the immunized witness. As such, it is not the answer to the question of the proper scope of act-of-production immunity.

B. *The Total Immunity Approach*

The second approach to act-of-production immunity (one apparently not seriously advanced by anyone other than some unsuccessful litigants) would be that the contents of the subpoenaed items are always a derivative use of the act of production. It is discussed here essentially as a bookend opposite the Government approach. This subsection, in combination with subsection A, will illustrate the inadequacies of a simplistic formula for deciphering the scope of act-of-production immunity, at either end of the spectrum of alternatives.

The argument for a total ban on the use of the contents of the subpoenaed items might be made in either of two forms. The first argument starts from the premise that a constitutionally acceptable grant of immunity must afford the witness protection coextensive with the protection of the privilege itself.¹⁶¹ When a witness is privileged from producing subpoenaed items, the incriminating contents of those items cannot be obtained or used by the government. If, however, the government, under any circumstance, can immunize the act of production and thereby make use of the incriminating contents of the subpoenaed items, the immunized witness is manifestly in a far worse position than he was prior to receiving the immunity grant. Therefore, the argument is, the contents of the subpoenaed items must always be unusable by the government in a prosecution of the immunized witness.

The second argument (essentially a variation of the first) relies upon an expansive notion of derivative use. But for the act of production, the government would not have the subpoenaed items. Therefore, the contents of the subpoenaed items constitute a derivative use of the immunized act of production.

The flaw in the second argument is that it fails to distinguish between the testimonial "act of production" and the "fact of production," *i.e.*, the nontestimonial fact that subpoenaed items are produced. But for the "fact of production," the government would not obtain the subpoenaed items. But the "fact of production," lacking any implicit testimonial significance, is not privileged. Only when the "act of production" conveys something testimonially significant about the existence, possession, or authentication of the subpoenaed items does the privilege attach. And only when the contents of the subpoenaed items can be said to be derived from the privileged component of production does the proscription against derivative use come into play.

It is true, of course, that the immunized witness is compelled to produce items the contents of which are incriminating. But this is not enough to trigger the privilege. A witness may be compelled to produce *nontestimonial*, incrimi-

159. See *supra* notes 130-32 and accompanying text.

160. See *supra* notes 128-29 and accompanying text.

161. *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

nating evidence, such as handwriting and voice exemplars.¹⁶² And when a witness is compelled to produce certain evidence, some of which is testimonial and some of which is not, only the former category is privileged.¹⁶³ A grant of immunity in such a circumstance would thus apply only to the former category. Therefore, in the context of an act-of-production privilege, to the extent that one can isolate the testimonial "act of production" from the nontestimonial "fact of production," evidence derived from the latter is not a derivative use of immunized testimony.

The first argument is also flawed for essentially the same reason. Although a grant of immunity must be coextensive with the privilege against self-incrimination, that truism does not mean that a witness must be placed in all respects in as good a position as he would have been in without the immunity grant.¹⁶⁴ For example, while a witness shielded by the privilege may remain silent, an immunized witness must testify. That testimony may leave the witness in a disadvantaged position by subjecting him to civil liability or public disgrace, but the grant of immunity is nevertheless sufficient to compel him to testify.¹⁶⁵ If the immunized witness testifies falsely, the grant of immunity does not prevent him from being prosecuted for perjury.¹⁶⁶ In fact, the government may use truthful, immunized testimony in a prosecution of the immunized witness for perjury committed during other portions of the same testimony.¹⁶⁷ Immunity, then, is not inadequate merely because the witness is consequently disadvantaged. For immunity to be insufficient, the deprivation which accompanies it must infringe upon the privilege itself, and be not merely incidental to the fact that the witness must now testify.¹⁶⁸

The same principles apply in the context of act-of-production immunity. An immunized witness may well be in a relatively inferior position insofar as the government obtains and is permitted to make evidentiary use of the contents of the subpoenaed items. But that deprivation is only significant if the contents are a derivative use of the privileged aspect of the act of production. Whether the contents constitute such a derivative use is, of course, precisely the question raised at the outset of the inquiry. Focusing on the obvious fact that the act-of-production immunized witness is disadvantaged advances the inquiry not at all. It simply leads circuitously back to the question of derivative use in the act-of-production immunity context.

Clearly, then, any attempt to sweep indiscriminately the contents of all subpoenaed items acquired incidental to act-of-production immunity into the perimeters of the forbidden derivative use is overbroad. If the total immunity approach is thus overinclusive, and if the Government approach is underinclusive, perhaps somewhere between these two views exists a theory which parses

162. See *supra* note 79.

163. Lushing, *supra* note 3, at 1709-10.

164. See, e.g., *United States v. Apfelbaum*, 445 U.S. 115, 121 n.6, 124, 126-27 (1980).

165. *Ullman v. United States*, 350 U.S. 422 (1956); *Brown v. Walker*, 161 U.S. 591 (1895).

166. Hoffman, *The Privilege Against Self-Incrimination and Immunity Statutes: Permissible Uses of Immunized Testimony*, 16 CRIM. L. BULL. 421, 432 (1980).

167. *Apfelbaum*, 445 U.S. at 126-27.

168. Cf. *id.* at 130-31.

what is derived from the testimonial "act of production" from what is derived from the nontestimonial "fact of production." Two such attempts are explored in subsection C.

C. *The Justice Marshall and Professor Mosteller Approaches*

As previously indicated,¹⁶⁹ Justice Marshall, concurring in *Fisher*,¹⁷⁰ advanced a theory that would treat the contents of the subpoenaed items as a derivative use of the immunized act of production under certain circumstances. The act of production may contain an implicit, testimonial component regarding the existence, possession, or authentication of the subpoenaed items.¹⁷¹ According to Justice Marshall, when the testimonial component of the act of production consists solely of implicit authentication, a grant of act-of-production immunity will not preclude the government from making evidentiary use of the subpoenaed item, provided the government authenticates the item without reference to the witness's act of production.¹⁷² However, to the extent that the testimonial component of the act of production includes an implicit admission of existence or possession, the "immunity grant must extend to the testimony that the document is presently in existence."¹⁷³ This would "effectively shield the contents of the document, for the contents are a direct fruit of the immunized testimony."¹⁷⁴

Apparently, Justice Marshall's theory is that any use of the contents of the subpoenaed items must start from the premise that such items exist and had been possessed by the immunized witness. Because the government learns of the existence and possession of the items through the immunized act of production, all use of the items would be a derivative use of the immunized act.¹⁷⁵

Justice Marshall's theory focuses exclusively upon the testimonial component of the act of production, and draws a bright line based upon that criterion. Where the testimonial aspect of the act of production includes existence or possession, a grant of act-of-production immunity bars the government from making any use of the subpoenaed items against the immunized witness. However, where the testimonial component consists solely of authentication, the government may confer act-of-production immunity and then use the produced items (but not the act of production itself) without any restriction except those inherent in the rules of evidence requiring authentication.¹⁷⁶

169. See *supra* note 97.

170. *Fisher v. United States*, 425 U.S. 391, 430-34 (1976) (Marshall, J., concurring).

171. See *supra* notes 84-87 and accompanying text.

172. *Fisher*, 425 U.S. at 433.

173. *Id.* at 434.

174. *Id.*

175. See Rosenblatt, *supra* note 96, at 236.

176. This dichotomy has been endorsed by several commentators. See, e.g., Rosenblatt, *supra* note 96, at 236; Rothman, *supra* note 67, at 443; Note, *Fifth Amendment Privilege and Compelled Production of Corporate Papers After Fisher and Doe*, 54 *FORDHAM L. REV.* 935, 958 (1986). Several lower courts have indicated that act-of-production immunity would not bar the government from using the independently authenticated documents, e.g., *Butcher v. Bailey*, 753 F.2d 465, 470 n.7 (6th Cir.), *cert. dismissed*, 473 U.S. 925 (1985); *United States v. Porter*, 711 F.2d 1397, 1403 (7th Cir. 1983); *United States v. McCollom*, 651 F. Supp. 1217, 1223 (N.D. Ill.), *aff'd*, 815 F.2d 1087 (7th Cir. 1987), while at least reserving the possibility that the contents would be a pro-

Professor Mosteller's theory¹⁷⁷ is similar to Justice Marshall's insofar as the result depends upon which of the three potential, testimonial components is actually present in the immunized act of production, but the actual results are somewhat different. Each of these three scenarios must be examined separately.

First, where the testimonial component is authentication, the government may generally use the contents of the produced items to accomplish authentication, provided it "set[s] out in advance the sources it will employ to authenticate"¹⁷⁸ If, however, the government uses the act of production and the documents produced to locate authenticating evidence, then such authenticating evidence is an impermissible derivative use.¹⁷⁹ The distinction appears to turn on when the government identifies its means of authentication. If this is accomplished "before production is compelled,"¹⁸⁰ then the use of the contents in order to accomplish authentication is not a derivative use and is permissible.¹⁸¹

Second, where the testimonial component is possession, the contents do not constitute derivative use.¹⁸² This is because evidentiary use of the contents "does not involve exploitation of the communication of possession implied in that production."¹⁸³ Professor Mosteller's conclusion regarding possession is thus diametrically opposed to that of Justice Marshall.

Third, where the testimonial component is existence, and where the implicit testimony is privileged because existence is not a foregone conclusion,¹⁸⁴ act-of-production immunity effectively precludes use of the contents against the producing witness.¹⁸⁵ This is because any use of the subpoenaed items is predicated upon the fact that the items exist, a fact directly learned through the act of production.¹⁸⁶ Thus, argues Professor Mosteller, the contents are themselves a derivative use of the immunized act of production.¹⁸⁷ As to existence, then, the approaches of Professor Mosteller and Justice Marshall yield identical results.

Both approaches attempt to define derivative use in the context of act-of-production immunity by focusing upon the particular testimonial component present in the act of production. Depending upon the particular testimonial component, the contents of the produced items will or will not be a derivative

scribed derivative use where the testimonial component of the immunized act of production is existence or possession, *Porter*, 711 F.2d at 1403 n.5; *McCullom*, 651 F. Supp. at 1223. *But see In re Trader Roe*, 720 F. Supp. 645, 648 (N.D. Ill. 1989).

177. Mosteller, *supra* note 93, at 40-49.

178. *Id.* at 41.

179. *Id.*

180. *Id.* at 42.

181. Of course, when the government can identify its means of authentication in advance of production, many courts have treated authentication as a foregone conclusion and rejected any claim of privilege. *See supra* note 96.

182. Mosteller, *supra* note 93, at 42.

183. *Id.* at 42 n.132. Of course, where possession is itself incriminating, as with contraband or where it supplies evidence of guilty knowledge, the government may not make direct evidentiary use of the immunized act of production to prove possession. *Id.* at 42.

184. *Id.* at 48.

185. *Id.* at 43-48. *Accord Stuntz, supra* note 83, at 1278 & n.185.

186. *Id.* at 43.

187. *Id.*

use of the act of production, without regard to the evidentiary use of those items by the government. The difficulty with this categorical approach is initially illustrated by the conflicting results obtained by Justice Marshall and Professor Mosteller. And while each approach has some intuitive appeal, analytically the distinctions themselves are problematic.

For example, Justice Marshall would treat the contents as a derivative use whenever existence is a privileged, testimonial component of the immunized act of production.¹⁸⁸ However, his theory would not treat the contents as a derivative use where authentication is the privileged, testimonial component of the immunized act of production. The former conclusion is logically premised upon the fact that no evidentiary use can be made of an item unless and until one knows that the item exists. It is, however, equally true that no evidentiary use can be made of an item unless and until one knows what that item is. The distinction simply cannot be justified analytically.

Suppose, for example, that the government subpoenas a witness to produce his diaries for specified years.¹⁸⁹ Production would constitute implicit testimony as to both the existence of such diaries and the authentication of them in the sense that they are the documents designated in the subpoena. If existence is not a foregone conclusion, Justice Marshall's approach dictates that a grant of act-of-production immunity would bar any use of the diaries against the witness. This is because the government cannot use the diaries until it knows they exist, which it learned only through a grant of immunity.

Suppose instead that the government has such ample proof that there are in fact such diaries that existence is found to be a foregone conclusion. The fact remains, however, that production is privileged because it implicitly authenticates the diaries. In this scenario, the government may, notwithstanding a grant of act-of-production immunity, make unlimited use of the diaries, including authenticating them by means of textual content, handwriting exemplars, or other uses of the diaries themselves. Although the government may not use the witness's act of production directly to authenticate the diaries, without the implicit authentication inherent in the act of production, the government would not know, for example, whose handwriting exemplars to compare to the handwriting in the diaries. It is difficult to see how the use of the contents in this scenario is any less a derivative use of the immunized, authentication testimony implicit in the act of production than it is in the first scenario where existence is the privileged, testimonial component.

Professor Mosteller's theory is at least apparently more defensible in this regard, for he would treat the contents as exempt from the proscription against derivative use only where the government can specify its source of authentication in advance of production.¹⁹⁰ But if this additional requirement means only that the government indicate, for example, that it will compare handwriting

188. See *supra* notes 173-75 and accompanying text.

189. In order to isolate the fifth amendment implications in this hypothetical, we must assume that there are no valid fourth amendment objections to the subpoena. But cf. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 196, 208 (1946).

190. See *supra* notes 177-79 and accompanying text.

exemplars of the producing witness with the handwritten items produced pursuant to the grant of immunity,¹⁹¹ then there is very little, if any, limitation upon the government's ability to use the contents where authentication is the only testimonial component of the act of production. And if this type of advance showing is sufficient in the authentication situation to avoid the bar of derivative use, then presumably the government could accomplish the same exemption in the existence situation by specifying in advance how it will prove existence. This could be easily accomplished simply by examining the produced item.

Perhaps the advance showing contemplated by Professor Mosteller in the authentication situation is a more demanding one. The actual example used by Professor Mosteller is one where the government, prior to production, lists alternative individuals who will be able to authenticate the items once produced.¹⁹² Advocates of the Mosteller approach might argue that actually identifying the authenticating witness (in contrast with merely identifying a method of authentication, as in the above handwriting exemplar scenario) is required in order to sever the implicit authentication in the act of production from the use of the produced items. There is, however, no analytically significant distinction between the two scenarios.

A handwriting method of authentication requires a comparison between the produced items and an independent exemplar. So too a witness who authenticates compares the produced items with his own recollection of those items. In the case of the handwriting method, the government knows which items to compare to the exemplar by virtue of the act of production.¹⁹³ So too the act of production signals to the government which documents to show to the "independent" authenticating witness. In the case of the authenticating witness, the government is making the same derivative use of the act of production as in the case with the handwriting exemplar.

More significantly, the independent, authenticating witness scenario does not allow for Professor Mosteller's distinction between authentication and existence. Where the testimonial component is authentication, the government may use the contents provided it identifies, in advance of production, a witness who will be able to authenticate the subpoenaed item upon an examination of that item. Why, then, where the testimonial component is existence, can the government not accomplish the same result by identifying, in advance of production, a witness (obviously any conscious person) who will be able to testify to the existence of the subpoenaed item upon an examination of that item? Viewed from the witness's perspective, if any use of the item's contents is derived from the implicit testimony as to existence, then why is the same conclusion not required regarding authentication, for it is only by virtue of the act of production that the government knows which items to show to the authenticating witness?

191. See *United States v. McCollom*, 651 F. Supp. 1217, 1223 (N.D. Ill.), *aff'd*, 815 F.2d 1087 (7th Cir. 1987).

192. Mosteller, *supra* note 93, at 41.

193. Arguably the act of production provokes the government to obtain an exemplar from the producing witness, but this is unlikely. Much more probably, the information which led the government to subpoena that witness in order to obtain the items would cause the government to target that witness to produce the exemplars.

Similar difficulties surround Professor Mosteller's general exclusion of the contents from the category of derivative use where the testimonial component is possession. Suppose, for example, that T is the target of a homicide investigation in which the victim was killed with a .38 caliber handgun. The government suspects that T possesses such a weapon, but lacks the probable cause necessary to obtain a search warrant. Instead, it serves a subpoena duces tecum upon T demanding production of any .38 caliber firearm in T's possession. T raises an act-of-production privilege, and the government confers act-of-production immunity upon T. T then produces a .38 caliber handgun. With the weapon in hand, the government first learns from ballistics experts that the gun is in fact the murder weapon. Furthermore, an examination of the serial number reveals that the gun is registered to N, a neighbor of T. The government then interviews N, who indicates that he (N) loaned the gun to T about one week before the crime and has not seen it since.

By virtue of the grant of act-of-production immunity, the government is obviously barred from making direct evidentiary use of T's act of production. In other words, the government cannot introduce into evidence the fact that T produced the gun. But if the "contents" of the gun do not constitute a derivative use of the act of production where the privileged testimonial component is possession,¹⁹⁴ then the government should be able to use N's testimony (discovered as a result of an examination of the serial number, or "contents," of the weapon) as evidence that T possessed the murder weapon at about the time of the crime.¹⁹⁵

Whether such a result is correct or not, it is difficult to harmonize with the prohibition against the use of the contents where existence is the privileged testimonial component. The government in the above scenario presumably is in possession of many more guns than the one produced by T. It only knows to pursue its homicide investigation with regard to this particular gun as a result of T's immunized act of production. In this scenario, the government's use of the "contents" of the gun is no less an exploitation of T's implicit acknowledgment of possession than is a use of the contents of items produced an exploitation of the implicit acknowledgment of such items' existence.

In short, the attempts to delineate when the contents of subpoenaed items are a derivative use of the immunized act of production, based solely upon the category of the implicit testimonial component of the act of production, do not produce convincing distinctions. A solution to the problem of defining derivative use in the context of act-of-production immunity requires a somewhat different framework.

194. In this scenario, existence would not be a privileged testimonial component of the act of production. By virtue of its knowledge that the victim was killed with a .38 caliber firearm, the existence of such a firearm is manifestly a foregone conclusion. What the government does not know, but for the act of production, is that T is in possession of such a weapon.

195. As an alternative illustration, if the contents are not a derivative use of the admission of possession implicit in the act of production, then the government can, theoretically, subpoena persons to produce illegal drugs in their possession, grant act-of-production immunity, examine the produced drugs for fingerprints, and use that evidence in the prosecution of the producing witnesses for possession of the produced drugs.

IV. AN ALTERNATIVE PROPOSAL

The problem of defining the scope of derivative use following a grant of act-of-production immunity is obviously a difficult one. To a certain extent, the problem is a resurrection of the "inherent inconsistency" between two principles: first, that use/derivative use immunity must leave the immunized witness in the same position as he was in prior to the immunized testimony, and second, that the protection afforded by use/derivative use immunity "need not be broader than the privilege itself."¹⁹⁶ But the problem is significantly more complicated in the act-of-production context by the fact that, apparently, one must attempt to isolate what is derived solely from the testimonial component of what is in reality a single, undifferentiated act of production.

Although various approaches have been advanced regarding this problem, the commonality among them is the notion that determining whether and when the contents of the subpoenaed items are derived from the immunized act of production is susceptible to some scientific-like analysis. The unarticulated assumption appears to be that, if we can just identify the testimonial component of the act of production, the scope of derivative use will materialize through the application of ordinary scientific principles of causation. Not surprisingly, then, the suggested solutions create categories of derivative use based solely upon the privileged testimonial component, and generally without regard to the evidentiary use to be made of the contents by the government.

There is a substantial problem inherent in this method. The bifurcation of the act of production into testimonial and nontestimonial components is an entirely abstract exercise. It is an analytical distinction that is useful and workable when one examines the act of production itself. One can, without inordinate difficulty, comprehend the testimonial aspects implicit in the act of production, and such a construct is helpful to an understanding of what is privileged in the act of production. But, because it is merely a construct, it will not necessarily be useful when examining the consequences of the act of production. In other words, it may be that the artificial separation of privileged and unprivileged components of a single act, without additional criteria or refinement, cannot be carried forward with any precision into the concept of derivative use. In fact, if one approaches the problem of defining derivative use solely by applying scientific or empirical criteria, no useful distinctions will be made. Although some particular illustrations of this problem have already been explored,¹⁹⁷ understanding the generalized accuracy of the above conclusion requires revisiting a few fundamental principles governing use/derivative use immunity.

While the constitutionality of use/derivative use immunity is now well-settled, prior to *Kastigar*¹⁹⁸ there was considerable doubt as to whether such immunity would provide constitutionally sufficient protection for the immunized witness.¹⁹⁹ Such a form of immunity was ultimately determined to be accept-

196. Hoffman, *supra* note 166, at 431. See also *supra* note 29.

197. See *supra* notes 188-95 and accompanying text.

198. *Kastigar v. United States*, 406 U.S. 441 (1972).

199. See *supra* notes 6-23 and accompanying text.

able, but only to the extent that it does not leave the witness in an inferior position.²⁰⁰ And in gauging the position to which the immunized witness must be restored, it must be kept in mind that a witness is privileged from being compelled to provide any link in the chain of evidence establishing his criminal liability.²⁰¹ Such a link can include focusing the government's investigation upon particular evidence.²⁰²

When the government immunizes the act of production, the production of the subpoenaed items has identified for the government which items it should focus its investigation upon. This is true whether the privileged, testimonial component of the act of production is existence, possession, authentication, or some combination thereof. No matter what "independent" evidence the government may have of existence, possession, and authentication, it is the immunized act of production which tells the government which items to authenticate, to prove were in the witness's possession, or to prove exist.

This extremely broad, or but/for, test of derivative use, while a logical prerequisite, is not necessarily legally sufficient. The determination in the law of whether something is derived from, or caused by, some preceding event is frequently not reducible to merely scientific or empirical criteria.²⁰³ Policy considerations often intrude upon the selection of legally significant causes from among a greater number of logically justifiable possibilities.²⁰⁴ In some circumstances, the policy criteria cannot be articulated any more precisely than what seems to be fair or just.²⁰⁵ Indeed, the imprecision of the concept of "fruits of the poisonous tree," the model for the concept of "derivative use," is an apt illustration of this point.²⁰⁶

The question, then, is when is the government's use of produced items unfairly derived from the immunized act of production, and when is the government's use of produced items sufficiently attenuated from the act of production so that such use is not an unfair derivation of immunized testimony. The formulation of the question suggests the path to the answer. Instead of attempting to base this distinction entirely upon a metaphysical parsing of the potential testimonial components of the act of production, the focus should be upon the use the government seeks to make of the produced items.

200. *Kastigar*, 406 U.S. at 462.

201. See *supra* note 16 and accompanying text.

202. See *supra* note 60.

203. Cf. H.L.A. HART & T. HONORÉ, *CAUSATION IN THE LAW* 110 (2nd ed. 1985).

204. *Id.*

205. A prominent example is contained in the Model Penal Code's formulation of legal causation which, in relevant part, permits the assignment of criminal responsibility to an actor for results "not within the purpose or contemplation" of the actor if "the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense." MODEL PENAL CODE AND COMMENTARIES § 2.03(2)(b) (1985) (brackets in original). This formulation was intended to do away with artificial questions of proximate causation, see *id.* § 2.03 explanatory note at 261 n.17, 265, and instead to put the matter "squarely to the jury's sense of justice," *id.* at 261 n.17. As stated by Professor Herbert Wechsler, Chief Reporter for the Model Penal Code Advisory Committee, "[i]t seems to me that when a jury asks itself whether something is too remote, it must refer to some standard of conscience in answering that. It isn't geography; it isn't time. I don't know what the standard is, except justice . . .", 39th Annual Meeting, 1962 Proceedings A.L.I. 73-74 (1963).

206. See *supra* note 47.

The proposal here is that, whenever the government attempts to use the subpoenaed items to prove the very fact which constituted the privileged (and hence immunized), testimonial component of the act of production, such is a proscribed derivative use. Conversely, whenever the government attempts to use the subpoenaed items to prove any other fact, such use is sufficiently attenuated from the immunized act of production so as to be permissible. Some concrete illustrations will make this proposal clearer.

Suppose that the government has subpoenaed T to produce his diary for a specified year, and that subpoena is accompanied by a grant of act-of-production immunity. Where existence is the privileged (and hence immunized) component of the act of production, the government should not be permitted to use the diary in any way to prove existence. This would include a proscription against showing the diary to the jury or to a witness to accomplish that purpose. The government may only prove existence by evidence truly independent of the produced diary, such as testimony of witnesses with independent knowledge of the diary's existence.

Where possession is the privileged (and hence immunized) component of the act of production, the government should similarly be estopped from making evidentiary use of the diary to establish possession. This would include, for example, prohibiting the use of handwriting exemplars, fingerprints, or textual content to link the diary to the producing witness. And where authentication is the privileged (and hence immunized) component of the act of production, the government should be prevented from using the diary in any way to accomplish authentication. Thus, the government should not be permitted to show the diary to an authenticating witness.

In each of these scenarios, any other result would permit the government to compel otherwise privileged testimony, to become thus aware of the evidentiary significance of the produced item, and to then use the item to prove, against the immunized witness, the very fact (be it existence, possession, or authentication of that item) which it learned from that witness through the grant of immunity. This is true because the immunized act of production tells the government which items to focus upon. In such circumstances, surely the witness has been compelled to furnish a link in the "chain of testimony which is necessary to convict [him] of a crime."²⁰⁷ Where the government can make indirect use of compelled testimony to prove the very facts revealed in that testimony, only the most chimerical analysis could avoid the conclusion that the witness has been "compelled in [a] criminal case to be a witness against himself."²⁰⁸

207. *Counselman v. Hitchcock*, 142 U.S. 547, 566 (1892).

208. U. S. CONST. amend. V. Much the same conclusion has been suggested by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Hughes*, 380 Mass. 583, 404 N.E.2d 1239, *cert. denied*, 449 U.S. 900 (1980). In that case, the defendant, charged with assault by means of a dangerous weapon, had been held in contempt for failure to produce a gun pursuant to a court order. *Id.* at 585-86, 404 N.E.2d at 1240-41. The court vacated both the order to produce the weapon and the subsequent contempt judgment, sustaining the defendant's claim of fifth amendment privilege. *Id.* at 595, 404 N.E.2d at 1246. The court also offered the following observations on the consequences of a grant of immunity or some constructive equivalent.

The Commonwealth has not attempted to eliminate, as far as it could, the testimonial aspects of the defendant's producing the gun, by the expedient of undertaking that at trial it would authenticate the gun simply by the serial number (if that number appears), and would make no tender in the court room of the

By contrast, where the government uses the contents solely to establish something other than the very testimonial fact which rendered the act of production privileged,²⁰⁹ such use is outside the ambit of derivative use and is permitted. In these circumstances, although there may very well be a tenuous causal connection between the immunized act of production and the government's use of the produced items, that connection is too attenuated to be afforded legal significance. Where the government is not seeking to use the contents of the subpoenaed items to prove the very fact revealed by the implicit testimonial component of the act of production, it is not unfair to treat that use as derived solely from the unprivileged contents. The act of production is an event that precedes the acquisition of the contents, but the use made by the government does not derive from the act of production in any legally significant way. Where the government seeks to prove, for example, only the truth of a statement contained in a document, whether that document exists, was in the possession of the witness, or is the document specified in the subpoena is not logically necessary to the government's evidentiary objective.²¹⁰ Nor does the act of production provide the government with any investigative leads regarding the contents (as distinguished from the existence, possession, or authentication) of the document.

The government, which hopes to minimize the scope of derivative use following act-of-production immunity, would undoubtedly object that this proposal, as a practical matter, would inevitably bar the use of the contents for any

fact that it was the defendant who produced the gun. We go no further than to express doubt whether the case would have been materially altered by an offer of such an undertaking in the court below. . . . Implicit statements as to existence, location, and control would nevertheless have been compelled and the information would have been delivered over to the Commonwealth. The Commonwealth could use such information, mediately, to secure other incriminating evidence to put before the jury, and it can be assumed that the testimonial statement as to the location of the gun would be used, mediately, to lead to ballistics tests and ballistics evidence and an opinion thereon. . . . More generally, we express doubt whether a defendant may be compelled to deliver the corpus delicti, which may then be introduced by the government at trial, if only it is understood that the facts as to the source of the thing are withheld from the jury.

The conclusion we reach in this case follows from basic policies supporting the constitutional guaranty. As was said in *Couch v. United States*, 409 U.S. 322, 328 (1973), "[i]t is extortion of information from the accused himself that offends our sense of justice." And again: "our sense of fair play . . . dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev., 1961), 317;" *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964).

Id. at 594-95, 404 N.E.2d at 1245-46 (some citations omitted). See also Lefstein, *supra* note 93, at 915.

209. This can occur in a number of possible ways. First of all, of the three potential testimonial components of the act of production, not all will be privileged in each case. Act-of-production immunity should only immunize the privileged testimonial components, and consequently using the produced items to establish matters that are not revealed by immunized testimony does not violate the proposal set forth in the text. Second, the subpoenaed items, especially documentary items, will virtually always contain substantive matters of evidentiary significance other than proof of the existence, possession, or authentication of the items themselves. For example, a diary may contain a confession to the commission of a crime.

210. This is not to say that the probative value of the document may not depend upon the government establishing the existence, possession, or authenticity of the document. But if the relevant testimonial component is privileged, and if the government would use the document to establish the very fact which is revealed by the privileged testimony implicit in the action of production, the proposal advanced here would bar the government's effort as a derivative use of the immunized act of production.

purpose. Where the government would use the contents to establish the same fact as was a privileged component of the immunized act of production, use of the contents is barred as a derivative use. If the government cannot otherwise establish the same fact as was privileged, the government's ability to use the contents for other purposes is meaningless because, the argument is, the relevance of the contents cannot otherwise be established.

For example, in our hypothetical in which the government subpoenas T to produce his diary, imagine that production is privileged because all three testimonial components—existence, possession, and authentication—are present. Following a grant of act-of-production immunity, T produces his diary, and the government discovers an entry in which T confesses to commission of the crime under investigation. The government may theoretically use the diary to prove that T committed the crime, but may not use the diary to prove the existence, possession, or authenticity of the diary itself. As a practical matter, the government's ability to use the diary even to prove the admission contained therein may be nonexistent, first because the diary is irrelevant unless authenticated,²¹¹ and the diary may not be used to accomplish that prerequisite, and second because introduction of the diary into evidence would violate the proscription against using the diary to prove its existence.

Invariably proof of the existence²¹² and authenticity of an item are prerequisites to the relevance and admissibility of that item. In some cases, possession will share the same status.²¹³ Where any of these facts are privileged components of the immunized act of production, the argument is that the government's inability to use the subpoenaed items to establish such facts effectively precludes use of the items for any other purpose as well. Thus, the objection to the proposal offered here is that it effectively functions as a total immunization of the contents of items acquired pursuant to a grant of act-of-production immunity.

There are two responses to this objection. First, it somewhat overstates the impact of this proposal upon the government's ability to use the subpoenaed items. Second, to the extent that this proposal provides relatively greater protection to the act-of-production immunized witness than would exist under some other approaches to the problem,²¹⁴ it hardly follows of necessity that such a result is objectionable. Each of these responses requires further explication.

The fact that the government may not use the produced items to prove the existence, possession, or authentication of such items (where such facts are privileged) does not mean that the government cannot otherwise establish such facts. What will be seen is that, under certain circumstances, existence and pos-

211. See, e.g., FED. R. EVID. 402, 901.

212. In the ordinary situation in which the government does not acquire an item through the grant of immunity, the government "proves" the existence of an exhibit through the manifest presence of that exhibit in the courtroom. Only in the act-of-production immunity scenario does this heretofore unnoticed step in the process of a prosecution become significant.

213. This will occur where the relevance of an item depends upon the fact of possession by a certain individual, such as where the item is contraband or where the item is a document the contents of which the government wishes to establish were familiar to a particular person. See *supra* note 95.

214. See *supra* notes 117-60, 169-95 and accompanying text.

session can be established by independent evidence. However, there is no way to establish the authenticity of an item without making use of the item itself.

Once again, the hypothetical subpoena of T's diary provides a useful illustrative device. In our scenario, T's act of production is privileged because it implicitly acknowledges existence, possession, and authenticity, and the government acquires the diary by conferring act-of-production immunity upon T. The diary contains some incriminating admissions that the government wishes to introduce into evidence in a prosecution of T. Under the proposal advanced here, it may do so only if it can establish existence, possession,²¹⁵ and authenticity without use of the diary itself.

As to existence, such an independent showing can be made. For example, suppose that T has several roommates who can testify to the existence of such a diary.²¹⁶ The government need not use the diary to secure such testimony, and such testimony may be sufficient to establish the existence of the diary without actually showing the diary to the witnesses or the jury.²¹⁷ As to possession, such an independent showing can also be made in much the same way. Witnesses in a position to have observed T in possession of the diary at the relevant time may testify to such facts without using the diary itself.²¹⁸

Authentication, however, presents an insurmountable obstacle to the government. The government may well know, in advance of production, of witnesses who can authenticate the diary. But the inherent nature of authentication is such that it cannot be accomplished without use of the diary itself. Witnesses

215. In fact, because the relevance of the diary does not actually depend upon T's possession of it on the date of production, the government would be able to forego proof of possession as a prerequisite to admission of the diary. The possession component will nevertheless be examined in order to illustrate how it would function in a case in which possession would be a prerequisite to admissibility. *See supra* notes 95, 213 and accompanying text.

216. The identity and significance of such witnesses must be known to the government independently of the diary itself. Otherwise, use of such witnesses to establish the existence of the diary would be a derivative use of the diary, which would in turn be a derivative use of T's testimony (implicit in the immunized act of production) that the diary exists.

217. This creates a procedural problem. The government may not show the diary to the witnesses or the jury in order to prove its existence. However, the government may wish, and may be entitled, to introduce the diary in order to prove the incriminating admissions contained therein. Obviously, once it introduces the diary for the latter purpose, existence is manifest. The problem is how to ensure that the government in fact proves existence of the diary independently of the introduction of the diary itself.

One potential solution would be to instruct the jury that it should not consider the contents of the diary unless and until it is satisfied by independent evidence that the diary exists. *Cf. FED. R. EVID.* 104(b). But this solution requires entirely unrealistic confidence in the jury's abstract reasoning capabilities, especially where the jury will not be given any reasons for engaging in such metaphysical discriminations. A preferable solution would be for the court to consider the government's independent evidence of existence, and, if satisfied that the government had met its burden in that regard, to admit the diary for the jury's unqualified consideration. *Cf. FED. R. EVID.* 104(a).

218. Again, the identity and significance of the witness must be known to the government independently of the diary itself. *See supra* note 216.

Note that the procedural problem inherent in the existence scenario, *see supra* note 217, will not necessarily be present where possession is at issue. While the mere presence of an item in the courtroom is incontrovertible proof that the item exists, the same is not true of possession. The item will only be proof of prior possession, if at all, where the contents of the item include some evidence of that fact. In many of these cases, that portion of the contents may be redacted without destroying the permissible evidentiary significance of the item. Thus, in most cases where possession of the item is a necessary component of the government's case, no preliminary ruling by the court will be required in order to ensure that the government establishes possession of the item independently of the item itself.

may testify as to the particular identifying characteristics of T's diary, but authentication cannot be accomplished until someone (whether it be the witness or the jury) examines T's diary in order to determine whether it matches the witnesses' description. Thus, it is impossible to make an independent showing of authenticity.

It would appear, then, that whenever authentication is a testimonial component of the act of production, the government will be precluded from using the contents for any purpose. As authentication will invariably be a prerequisite to admissibility, and as the government can never accomplish authentication independently of the produced item, the practical effect indeed appears to be total immunization of the contents. There will, however, be many cases in which this limitation will be of no practical consequence. This may be true for any of several reasons.

First, one must not lose sight of the "foregone conclusion" concept.²¹⁹ Where authentication is a foregone conclusion,²²⁰ no privilege will attach, no immunity need be extended, and no proscription against derivative use will come into play.²²¹ The government's ability to demonstrate that authentication is a foregone conclusion will thus be critical in many cases.²²² As the exact meaning of "foregone conclusion" is still somewhat uncertain,²²³ the practical ability of the government to compel production of evidence from targets of prosecutions will, in many cases, depend upon future developments in the refinement of that concept.

Second, the privilege against self-incrimination may only be invoked by a witness who suffers a realistic apprehension that his testimony will expose him to criminal sanctions.²²⁴ Where the witness's implicit authentication cannot realistically incriminate that witness, no privilege is present and, of course, the items may be acquired by subpoena without a grant of immunity.²²⁵

Third, because the privilege is personal to the person being compelled to testify,²²⁶ a grant of act-of-production immunity to a witness will not preclude the government from making direct and derivative use of both the act of production and the produced items against any party other than the immunized witness.²²⁷ Indeed, where the subpoenaed items are those of a collective entity, the only limitation upon the government will be that it may not make *direct*

219. See *supra* notes 88-90 and accompanying text.

220. See *Fisher v. United States*, 425 U.S. 391, 410-13 (1976).

221. This is not limited solely to where authentication is the relevant testimonial component. Although it is possible for the government to make an independent showing of existence or possession sufficient to avoid the proscriptions of derivative use following a grant of act-of-production immunity, see *supra* notes 215-18 and accompanying text, in many cases the government will be able to persuade the court that existence or possession is a foregone conclusion by making the same showing prior to production. See *supra* note 96.

222. Cf. *Mosteller*, *supra* note 93, at 48-49.

223. See *supra* note 96.

224. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Lushing*, *supra* note 3, at 1702.

225. See *Fisher v. United States*, 425 U.S. 391, 412-13 (1976).

226. E.g., *Hale v. Henkel*, 201 U.S. 43, 69 (1906).

227. There the government, pursuant to Section 6003, applies to the district court for an order compelling production of subpoenaed items, and that application is accompanied by a grant of act-of-production immunity, the court performs a ministerial function and must issue the order. *In re Sealed Case*, 791 F.2d 179, 181 (D.C. Cir.), cert. denied, 479 U.S. 924 (1986). Only if and when the government later prosecutes that witness will the

evidentiary use of the custodian's act of production in a prosecution of that custodian.²²⁸

There will, nonetheless, be many cases in which the scope of derivative use under this proposal will effectively preclude the government from using act-of-production immunity to compel investigative targets to produce tangible evidence. The simple justification for this result, however, is that it is constitutionally required. In the ordinary case where the government extends use/derivative use immunity, the proscription against derivative use rarely allows for the subsequent prosecution of the immunized witness.²²⁹ To the extent that the same practical consequences follow from the proposal here regarding act-of-production immunity, that proposal merely strikes a familiar balance necessary to preserve the fifth amendment rights of the immunized witness. Use/derivative use immunity, even as recast in the form of act-of-production immunity, is not a device for compelling investigative targets to produce, even indirectly, the very evidence that will be used to prosecute them.²³⁰

V. CONCLUSION

The intersection of the doctrines of use/derivative use immunity and the act-of-production privilege produces an uneasy synthesis, especially in defining the scope of derivative use. Understanding the scope of derivative use in the context of act-of-production immunity requires focusing not only upon the privileged testimonial component implicit in the act of production, but also upon the evidentiary use the government wishes to make of the items produced. The result is the proposal offered here; *i.e.*, that the contents of the produced items constitute a derivative use wherever the government would use such contents to establish the very testimonial fact which was privileged in the act of production. Such an approach is necessary in order to preserve the fifth amendment rights of the immunized witness.²³¹

government, pursuant to Section 6002, be required to make a *Kastigar* showing that none of its evidence was derived from the immunized act of production. *Id.* at 181-82.

228. *Braswell v. United States*, 487 U.S. 99 (1988). *Braswell* is more fully discussed *supra* at notes 141-57 and accompanying text.

229. *See supra* notes 64-67 and accompanying text.

230. *See supra* notes 68-69 and accompanying text.

231. *Cf. Kastigar v. United States*, 406 U.S. 441 (1972).

